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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 299

THOMAS M. KAVANAGH and
EUGENE F. BLACK,
Appellants,
v.
SANFORD A. BROWN, Treasurer of Michigan, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

JURISDICTIONAL STATEMENT

THOMAS M. KAVANAGH,
The Capitol,
Lansing, Michigan;
EUGENE R. BLACK,
County-City Building,
Port Huron, Michigan,
(members of the bar of the
Supreme Court, appearing
in their own behalf).

Interstate Brief & Record Co., 356 Congress St. E., Detroit 26, Michigan

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INTRODUCTION

This is a direct appeal by Thomas M. Kavanagh and Eugene F. Black, plaintiffs below, from a judgment (styled "Order and Decree") of the United States District Court for the Eastern District of Michigan, Southern Division. By such judgment temporary and permanent injunctive relief, sought by the named plaintiffs from past—and

presently continuing—acts of the defendant fiscal officers of Michigan, committed by such officers under color of correlative and allegedly unconstitutional statutory provisions of Michigan,[1] was denied on the merits by a duly convened District Court of three judges. This jurisdictional statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court is not as yet officially reported. It is attached to this jurisdictional statement as appendix A, *infra*, at pages 23-34.

The judgment of the District Court is dated July 11, 1962 and was entered July 11, 1962. It is attached hereto as appendix B, *infra*, at pages 35-37.

JURISDICTION

This suit was brought under sections 1331 (62 Stat. 930) and 2281 (62 Stat. 968) of Title 28, United States Code, to enjoin the operation and enforcement of the presently quoted statutes of Michigan on assigned ground that same deny to plaintiff-appellants equal protection in violation of the equality clause of the Fourteenth Amendment.

The final judgment (styled "Order and Decree") below, by which plaintiff-appellants' complaint was dismissed on the merits and with prejudice, was dated and entered July 11, 1962.

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[1] Upon authority of American Federation of Labor v. Watson, 327 US 582 and Lathrop v. Donohue, 367 US 820, this statement will refer to the questioned parts of Michigans Constitution and legislative enactments as "statutes" or "statutory provisions".

Appellants' notice of appeal was filed July 25 with the clerk of the District Court below. The statutory provision conferring jurisdiction of the Supreme Court to hear and determine this appeal is 28 USC, §1253 (62 Stat. 926).

With respect to the jurisdiction plaintiff-appellants counted below and count here upon the rule, announced first in *Osborn v. Bank of United States*, 9 Wheat (US) 738, that the courts of the United States will restrain a State officer from executing a State statute when to execute that statute would violate rights of the complainant assured to him by the Federal Constitution and would work irreparable damage to such complainant. To distinguish the line of cases relied upon by then Michigan Attorney General Adams,[2] plaintiff-appellants relied below and rely here upon the test which appears by footnote in *Georgia R. etc. Co. v. Redwine*, 342 US 299, 304, that is, "Appellant in this case merely seeks the cessation of appellee's allegedly unconstitutional conduct and does not request affirmative action by the State." In the *Redwine Case* the Court ruled (p. 304):

> "This Court has long held that a suit to restrain unconstitutional action threatened by an individual who is a state officer is not a suit against the State. These decisions were reexamined and reaffirmed in *Ex Parte Young*, 209 US 123, 52 L ed 714, 28 S Ct 441, 13 LRA NS 932, 14 Ann Cas 764 (1908), and have been consistently followed to the present day."

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[2] See opinion of Mr. Justice Frankfurter, in Larson v. Domestic and Foreign Corp., 337 US 682, 729-732, for alignment of cases holding for and against the jurisdiction in suits brought against State officers. The heading reads:

> "Cases since Osborn v. Bank of United States, 9 Wheat (US) 738, concerning suits against governmental agents in which defense of sovereign immunity was raised."

Appellants have not and do not ask that the Federal judiciary order that affirmative action be taken by Michigan or her fiscal officers. They have not sought and do not seek to have the Federal judiciary fix the *amount* of the equal salaries members of the Michigan Supreme Court should receive. They sought and seek an injunction, nevessarily prospective in its operation and effect, by which the defendant State officers are enjoined from paying unequal salaries to members of such Court. Thereby appellants hope to obtain, in addition to affirmative answers for questions 1 and 3 as set forth in their notice of appeal, a determination by this Court that the concluding sentence of section 3 of article 16 of the Michigan Constitution, *in its application to the members of the Michigan Supreme Court as a class,* invidiously discriminates against such class in favor of circuit judges of the State, as a class. Emphasis in such regard will be made of the three word exemption, favoring circuit judges, which appears in such concluding sentence. *The like of it cannot be found in the Constitution of any other State* (Hawaii and Alaska, not examined, possibly excepted).

Appellants respectfully offer this concluding word concerning the jurisdiction: If as contended by them and upheld below the instant complaint conferred jurisdiction on the three-judge court to hear and determine the merits of the presented constitutional questions, then this Court on direct appeal from such court has "jurisdiction over *all* claims raised against the statute [statutes]." It was so held in *Florida Lime & Avocado Growers v. Jacobsen,* 362 US 73, 80, 81.

THE STATUTES INVOLVED

Two complementing statutes of Michigan are involved. They are:

A. The concluding sentence of §3 of Article 16 of the Michigan Constitution of 1908, reading:

> "Salaries of public officers, *except circuit judges*, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

B. The second section of Michigan Public Act No. 163, of 1960 (official section 601.1). The complete act, exclusive of title reads:

> "601.6 *Supreme court justices; salary* [M.S.A. 27.26].
>
> "Sec. 6. Each justice of the supreme court shall receive an annual salary of $25,500.00, payable out of the moneys appropriated by the legislature.
>
> "*Same; present justices.*
>
> "Section 2. Justices of the supreme court in office on the effective date of this amendatory act shall not receive any increase in annual salary until the expiration of their respective terms of office.
>
> "Approved May 24, 1960" (effective August 17, 1960).

It is necessary to advise at this juncture that *the quoted statute* (§601.6) of 1960 *was repealed* by the legislature of Michigan *during the legislative session of 1961*. See

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[3] The circuit judges of Michigan, 81 in all, are judges of Michigan trial courts of original jurisdiction. All appeals from such courts are taken directly to the Supreme Court of Michigan. The latter is the constitutional superintendent of such trial courts; also of all other Michigan courts (Mich. Const., article 7, §4). There is no intermediate appellate court.

Michigan Public Act No. 236, of 1961, p. 688, expressly repealing sections 600.1 through 681.13, including §601.6 above. The repeal does not, however, go into effect until January 1, 1963 (p. 691, same book of 1961 public acts). Such repealed section (§601.6) is superseded effective January 1, 1963, by §208 of the same act of 1961, No. 236 (p. 419 same book of 1961 public acts).

The superseding section will eliminate *that part of said act 163 (§2) which plaintiffs criticize as unconstitutional.* From and after January 1, 1963 the statutory replacement will stand effective as follows (Mich P.A. 1961, §208, p. 419 same book of 1961 public acts):

> "600.208 *Same; salary, expenses* [M.S.A. 27A. 208].
>
> "Sec. 208 (1) Each supreme court justice shall receive an annual salary of $25,500.00, payable out of the moenys appropriated by the legislature.
>
> (2) The justices shall not receive any allowance for traveling expenses between their residences and the seat of government.
>
> (3) The justices who attend judicial meetings called by the court administrator shall be reimbursed from the state treasury, upon the warrant of the state treasurer, for their actual and necessary expenses."

QUESTIONS PRESENTED

1. Do the Michigan statutes brought to question by plaintiff-appellants' complaint, consisting of the concluding sentence of article 16, section 3, of the Constitution of Michigan and correlative section 2 of Act No. 163 of the Michigan Public Acts of 1960, in their application to plain-

tiff-appellants as two of the eight equally sworn and equally working members of the Supreme Court of Michigan, invidiously discriminate against plaintiff-appellants in violation of the equality clause of the Fourteenth Amendment?

2. Do the same statutes, providing as they do exemption of all circuit judges of Michigan from the prohibition against salary increases said section 3 (of article 16) decrees, invidiously discriminate against unequally treated members of the Supreme Court of Michigan, plaintiff-appellants included, in violation of the equality clause of the Fourteenth Amendment?

3. Do the same statutes, considering the length of the elective terms of all members of the Supreme Court of Michigan compared with the shorter elective terms of all other judicial officers of Michigan, invidiously discriminate against all members of the Supreme Court of Michigan, plaintiff-appellants included, in violation of the equality clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Plaintiff-appellants, applying to the District Court for injunctive relief under §2281, Title 28, United States Code (62 Stat. 968), alleged that the operation and enforcement of the quoted statutes of Michigan deny to them the equal protection of the laws in violation of the equality clause of the Fourteenth Amendment. The defendant officers, appearing by former Michigan Attorney General (now Michigan Supreme Court Justice) Adams, moved to dismiss on jurisdictional grounds and, with respect to the merits, denied that the inequality charged by plaintiffs was or had become actionably invidious.

The motion to dismiss, and the merits of the case, were duly submitted to a court of three judges composed of the Honorable John D. Martin, United States Circuit Judge for the Sixth Circuit, the Honorable Thomas P. Thornton and the Honorable Fred W. Kaess, United States District Judges for the Eastern District of Michigan, on September 25, 1961. The issues were taken under advisement with allotted time for submission of briefs, all of which were duly furnished.

Judge Martin having become ill, and still another *pendente* change of the personnel of the Michigan Supreme Court having taken place,[4] plaintiff-appellants applied March 22, 1962 for a temporary restraining order to prevent irreparable damage. The application having been

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[4] The first change of personnel, occurring since commencement of this action, was the resignation October 10, 1961 of former Justice Talbot Smith to accept appointment to the United States District Court bench (Eastern District of Michigan); the annual salary at such post being $22,500. Had Justice Smith remained a member of the Michigan Court he would, under the ruling below, have been compelled to toil with his higher paid ($7,000 per year more) Brothers at the same bench and doing the same exact work, until December 31, 1965.

Present Justice Otis M. Smith was appointed (October 10, 1961) to fill the vacancy occasioned by Justice Talbot Smith's resignation.

The second change occurred December 31, 1961 when former Justice George Edwards resigned to become Police Commissioner of Detroit. Had Justice Edwards remained a member of the Court he would, under the ruling below, have been compelled to toil similarly with his higher paid Brothers, at the same bench and doing the same exact work, until December 31, 1967.

Present Justice Paul L. Adams was thereupon appointed to fill the vacancy occasioned by Justice Edwards' resignation.

Each newly appointed Justice, unlike his predecessor and on account of operation of the assailed statutes, commenced receiving and now receives an annual salary at the higher rate, $25,500. Ironically, former Attorney General Adams, defender of this case both as to jurisdiction and merit, has so far succeeded in preventing plaintiffs from receiving salaries at the higher rate; he meanwhile having moved up to the Court (January 1, 1962) to receive, as he now receives, a salary at the higher rate.

made under §2284, Title 28, United States Code, as amended June 11, 1960 (74 Stat. 201), and the three-judge Court having been satisfied, unavoidable delay considered, that the plaintiffs "may be unable to have redress under statutes of the State of Michigan for moneys denied them," a temporary order was issued (March 23, 1962) restraining the defendant State officers "from paying and continuing to pay unequal salaries to respective members of the Michigan Supreme Court." By such order all members of the Court were paid coequally (at the rate of $25,500 per annum) between such last given date and the date of dissolution of the temporary order (June 28, 1962). Since June 28, 1962 plaintiff-appellants, along with Chief Justice Carr, have been paid at the reduced rate of $18,500 per annum, the remaining five members of the Court meanwhile having been paid at the higher rate of $25,500 per annum. This situation will continue indefinitely, unless arrested by injunction or further resignations from the Court.

The temporary order of March 23, 1962 was issued by Judge Thornton "with the concurrence of Judges Martin and Kaess." Shortly thereafter (April 2) the tragic death of Judge Martin occurred. April 24 the Honorable Lester L. Cecil, Judge of the Court of Appeals of the Sixth Circuit, was designated to take Judge Martin's place as a member of the constituted Court. May 8 the parties stipulated that the reconstituted Court might proceed to determine all pending issues on the record and briefs as made and submitted. June 18 the Court filed its opinion, upholding the jurisdiction and holding further, on the merits, that the statutes assailed by plaintiff-appellants do not deny to them the equal protection of the laws. As previously noted the final judgment of the Court thereupon entered (July 11, 1962).

Plaintiff-appellants are Associate Justices of the Supreme Court of Michigan. Plaintiff Black, *not* appointed to the Court, was elected to the Court at the regular biennial spring election held in April of 1955, for the regular eight year term commencing January 1, 1956 and ending December 31, 1963. Plaintiff Kavanagh, *not* appointed to the Court, was elected to the Court at the regular biennial spring election held in April of 1957, for the regular eight year term commencing January 1, 1958 and ending December 31, 1965. All other present members of the Court were appointed thereto originally, save only as to Associate Justice Kelly. He, then Governor of Michigan, appointed present Justices Carr and Dethmers to the Court (Carr 1945 and Dethmers 1946) and later, at the spring election of 1953, was himself elected to the Court for the regular eight year term commencing January 1, 1954 and ending December 31, 1961. He, with his running mate on both occasions (Justice Dethmers), was reelected at the biennial spring election held in April of 1961 for the regular eight year term commencing January 1, 1962 and ending December 31, 1969.

The Constitution of Michigan (article 7, §2) provides that the highest court of the State, designated the Supreme Court, "shall consist of one chief justice and associate justices, to be chosen by the electors of the State at the regular biennial spring elections"; that "not more than two justices shall go out of office at the same time," and that the length of the staggered terms of the members of the court "shall be prescribed by law." (It will appear at once that Michigan's legislature may change, upward or downward at will, the numerical membership of the court; also that the legislature may, at similar will, shorten or lengthen the elective terms of members of the Court.)

Since 1963 the total membership of the Court has been, and is now, eight in number (CL Michigan 1948, §601.1). For reasons concealed in the depths of Michigan politics the constitutional Chief Justice has never been "chosen by the electors of the state." Instead, since 1963 and prior to 1955, "The powers and duties appertaining to the office of chief justice of the supreme court" (not the office itself we respectfully note) were made to "devolve," by an annual system of rotation effected by statute, upon the two members of the court whose terms were due next to expire (CL 1948, §601.5). Thus the two incumbent justices due next to meet the people, for reelection to the Court "at the regular biennial spring elections," have enjoyed—one after the other—the public designation of "Chief Justice" during the year preceding and during the year of such biennial spring election. This system of designating the "Chief Justice" continued until 1954. In that year Public Act No. 142 was enacted by the legislature of Michigan. Such act of 1954 pertinently provides (CLS 1956, §601.5):

> "The powers and duties appertaining to the office of chief justice of the supreme court on and after January 1, 1956, and prior thereto in case any vacancy occurs in the office of chief justice of the supreme court, shall at all times devolve upon and be exercised by a chief justice chosen by the justices of the supreme court from their own number, and any chief justice so selected shall serve until the expiration of the term for which he has been elected as a justice of the supreme court."

By the Act of 1954 the powers and duties of the chief justice of the Michigan Supreme Court were made to "devolve" upon Associate Justice John R. Dethmers. The devolution was effected by majority vote of the then constituted Court (adopted and made effective January 6,

1956). Since that date, and until April 3, 1962, such devolution continued in effect. On the last mentioned date such powers and duties were made to "devolve" upon Associate Justice Carr. Justice Carr is now the official devolutionee of such powers and duties. As in the case of Justice Dethmers, he is recognized and designated as "Chief Justice." He, by the resolution of April 3 above, will remain such devolutionee until his elective term ends December 31, 1963. He cannot be a candidate for re-election to the Court on account of an age limit fixed by section 17 of article 7 of the Michigan Constitution. He accordingly will retire at the end of 1963.

In 1939, effective January 1, 1940, the Constitution of Michigan was amended to provide what is popularly known as a "non-partisan judiciary."[9] All judges of the courts of record of the State, including members of the Supreme Court, are thereby elected at regular term intervals, at non-partisan elections, by means of separate ballots containing no partisan designation. However, as to the Supreme Court only, the method of nomination for such non-partisan office was left to legislation, that is, such nominations were left to "be made as now or hereafter provided by law." The result has been that all nominations of candidates for the office of Michigan Supreme Court Justice have, since 1939 as before, been made at partisan conventions. This brings us to the present and immediately past political composition of the Court.

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[9] The amendment of 1939 includes a built-in and provenly effective guarantee of election and re-election of an incumbent judicial officer, once he has attained the bench by appointment of the Governor or election thereto. The guarantee reads (Mich. Const., article 7, §23):

> "There shall be printed upon the ballot under the name of each incumbent judicial officer, who is a candidate for nomination or election to the same office, the designation of that office".

The instant complaint, not traversed in such regard by the defendant-appellees, shows that Justices Carr, Dethmers and Kelly are elected members of the Court by Republican nomination; that Justices Black, Kavanagh and Souris are elected members of the Court by Democratic nomination, and that Justices Otis M. Smith and Adams are (at present) members of the Court by gubernatorial appointment only. The last two are slated to be candidates for Democratic nomination and term election at the general election to be held November 6, 1962.

Five members of the Court, so composed, are by virtue of the first section of the quoted act of 1960 receiving an annual salary of $25,500; whereas the remaining 3 members, Justices Carr, Black and Kavanagh, are receiving and will continue to receive, failing presently sought injunctive relief, an annual salary of but $18,500. The situation came about this way.

In 1952, shortly before Republican Justice John R. Dethmers was due to run for his first regular 8 year term, and shortly before former Republican Governor Kelly was due to become his running mate as a candidate for like term membership at the same election (biennial spring election of 1953), the legislature enacted a statute prospectively elevating the annual salaries of to be elected or appointed members of the Court to $18,500. The statute:

> "60l.6 *Supreme court justices; salary* [M.S.A. 27.26].
>
> "Sec. 6. Each justice of the supreme court shall receive an annual salary of $18,500.00, payable out of the moneys in the state treasury belonging to the general fund not otherwise appropriated.

Same; present judges:

"Section 2. Justices of the supreme court in office on the effective date of this amendatory act shall not receive any increase in annual salary until the expiration of their respective terms of office."

Exactly 8 years later, and similarly during the year preceding their candidacy for their next 8 year coterminous terms, the legislature again elevated—prospectively—the salaries of the same two members of the Court. (See quotation of the act of 1960, *ante* p 6). During the past 13 years no other legislation, designed to increase or decrease the salaries of Michigan Supreme Court Justices, has been enacted.

Justices Dethmers and Kelly, having been elected in 1961 for such coterminous eight year terms (Jan. 1, 1962 through December 31, 1969) commenced receiving the 1960-fixed higher salary on January 1, 1962 and continue now to receive same. In the meantime, former Justice Voelker having resigned from the Court and having been replaced by appointed and later elected Justice Souris, the latter commenced receiving (in November of 1960), and now receives, his salary at the higher rate. Subsequently, Justices Talbot Smith and George Edwards having resigned and having been replaced by (appointed) present Justices Otis M. Smith and Paul L. Adams, the latter two members of the Court immediately commenced receiving, and do now receive, salaries at the higher rate.

This leaves three members presently receiving an annual salary of $18,500 and the remaining five members receiving an annual salary of $25,500. Such inequity, among the equally sworn-to-the-same-work members of the Court, will unless arrested by injunction (or in event of new and more punitive legislation in Michigan) continue as follows:

As to Justices Black and Carr (the latter being the veteran and most experienced member of the Court), such

members will continue until December 31, 1963 to receive an annual salary of $18,500, as five other Justices receive an annual salary of $25,500 per year.

As to Justice Kavanagh, he will continue to receive the lower salary two years longer. During that biennial (1964-1965), Justice Kavanagh, if he remains a Justice, *will be the only member of the Court not paid at the higher rate.*

THE QUESTIONS ARE SUBSTANTIAL

There is no other forum to which these plaintiffs may repair. All members of the Michigan Supreme Court are disqualified absolutely on account of personal interest (*Peninsular R. Co. v. Howard*, 20 Mich 18; *Stockwell v. Township Board*, 22 Mich 341; *Tumey v. Ohio*, 273 US 510, 522, citing the *Peninsular* and *Stockwell Cases*). And even if appellants could, despite such rule of disqualification, seek relief in the Supreme Court of Michigan, they would not do so for reasons of evident embarrassment—both ways. Finally, Michigan does not provide (as some States do) for calling up of inferior court judges for high court duty.

The decision below is an unrestricted license—issued to Michigan's legislature—authorizing acts of favoritism and punishment, for and against selected members of the higest Court of one of our great industrial States. There is nothing now to prevent legislative action reducing to, say, $10,000. per annum, the salaries of the two Michigan Supreme Court Justices who are due for eight year election (1964 through 1971) less than 10 months hence; with six other Brothers each receiving as that eight year period proceeds an annual salary of $25,500 (or more if and when legislative favorites come up for election during the period

1964-1971). Now all the legislature need do is *decrease* the salary by act made effective prior to election day (April 1, 1963); just as it *increased* the salary for two favorites on two occasions, as we have shown.

There is nothing, actually, to prevent legislative manipulation of salaries among the members of the Court in such way as to drive therefrom all but those who care not to offend legislators by decisions which, on occasion, must be onerous and unpalatable in legislative halls. The recent decision of the Michigan Supreme Court in *Scholle v. Secretary of State* (July 18, 1962), is a fair example of such onerous decision as was *Lockwood v. Com'r. of Revenue*, 357 Mich 517 (1959). The former was preceded, as one of the opinions (not yet reported) fully discloses, by an open legislative threat to impeach any Michigan Justice who voted to hold that the Michigan Senate was invalidly constituted.

It will not do to say that the jurisprudence of Michigan has nothing to fear in such regard. The remark is unprovable either way and, whether it be true or not, the fact of possibility remains. That is enough. As said in the like case of *Bailey v. Waters*, 308 PA 309, 162 A 819, 822:

> "It may be argued that the judiciary has nothing to fear from any attempted legislative control by a reduction of salaries. The question is not one of probability. It is one of possibility. It is not a question of fear, but one of power with which we are confronted."

The Court is respectfully referred to the following representative State cases. In each the court was called upon to consider—and avoid if possible—the untoward result of that which the District Court below has licensed: *Mc-*

Govern v. Mitchell, 78 Conn 536, 63 A 433, 437; *Commonwealth v. Mann*, 5 Watts & S. 403; *Commonwealth v. Mathues*, 210 Pa 372, 59 A 961, 973, and *Higer v. Hansen*, 67 Idaho 45; 170 P2d 411.

We hasten to add that each of these cases portrays the dilemma of a court which, faced with the impossible alternative the District Court has approved, proceeded to construe with forcefully stated reasons typical no-increase no-decrease provisions as *not* applying to judges who as a class are sworn to equal toil upon the same judicial product.

Probably the foremost of these cases is *Commonwealth v. Mathues*, the opinion of which was written by Judge (later Chief Justice) Von Moschzisker. He wrote, for the court (p 977, NR citation):

> "New and inexperienced judges would draw salaries considerably larger than old and experienced members of the judiciary. We would practically be face to face with a declaration by the Legislature, as shown by the act of 1903, that the salaries paid to the old judges are inadequate and not up to the adequate standard required by the constitutional mandate; and this condition would be impossible of remedy, or, at least, it could not fade out, until all of the present members of the Supreme Court, with their long terms of service yet to come, had passed from the scene, by which time we can fairly believe, according to the well-known fluctuations of the value of money, salaries would again have to be readjusted with the like condition of inequality repeated and covering another long period of years."

Mr. Justice Bell, unreservedly concurring, added this (p 979, NR citation):

> "But if we adopt the contention urged on behalf of the State Treasurer, we are driven to a condition, not of uniformity, but of inequality, and that of the most unreasonable and absurd character. What would be thought of a railroad which paid its youngest engineer, recently promoted from a fireman, and intrusted only with the handling of a shifting engine, a greater salary than that paid the veteran train runner, intrusted with the lives of hundreds of passengers, and guiding the swiftly moving express train with a skill gained by years of experience? But we are forced to such an unreasonable and absurd condition of affairs if we adopt the construction contended for by the respondent."

In the case cited below the court put our contention tersely in one sentence.

> "Certainly it is repugnant to sound principles of judicial administration to have justices performing the same functions and carrying the same responsibilities receiving different compensation." (*Ben-Venga v. LaGuardia*, 48 NYS 2d 117, 121; appeal transferred to Third Division by First Division, 50 NYS 2d 772; affirmed on other ground by Third Division 52 NYS 2d 767; affirmed on other ground by Court of Appeals 63 NE2d 88).

If it is so repugnant, and if appellants have proved the stated premise—as we submit stands established by the pleadings—, then it must be right to say that the presumption which ordinarily burdens those who assert a denial of equal protection has been in this case—completely destroyed.

In reality, what is involved here is the open prospect of undue influence over the judicial department of a State by the legislative branch thereof. *Commonwealth v. Mann*,

cited above and quoted in *Commonwealth v. Mathues* (p 973 NR citation) conveys the thought:

> "If it be correct that the power over a man's subsistence amounts to a power over his will, what instrument better calculated to give the Legislature an undue and improper influence over the judicial department of the government than by an address in the manner proposed to their hopes as well as their fears. As, for example, take the case in hand. Here the Legislature have assumed the control of the relator so far as he could be *influenced by the possession* or loss of $400 a year. Cases may occur when, with the aid of the additional salary, it may be merely a decent support of himself and family. A power, therefore, to reduce it may, it is obvious, be equivalent to a power to deprive him of office altogether."

Turning finally to presented Question 2:

Less dramatic than the discrimination these statutes attempt among and between the eight members of Michigan's Supreme Court, and yet even more lastingly vicious from a constitutional standpoint, is the discrimination by which the concluding sentence of said section 3 *favors* circuit judges, *as a class*, and *disfavors* Supreme Court Justices, *as a class*. On what ground of non-fanciful reason may it be said that trial court judges of a State[6] (elected for six year terms) may at legislative as well as local will receive during-term salary increases, but Supreme Court Justices of the State (elected for longer terms) may not?

---

[6] The Board of Supervisors of a county may, at any time, contribute additional salary to the circuit judge or judges of such county. Mich. Const. 1908, article 7, §12.

Here, then, is a separately forceful reason for holding that said section 3 invidiously discriminates against members of the Supreme Court of Michigan as a class. And we would point out that *the District Court, so far as its opinion discloses, failed to consider the discriminatory fact and result of those exempting words,* "except circuit judges."

CONCLUSION

The opinion below discloses no effort to conjure "any state of facts" which "reasonably may be conceived to justify" the discrimination appellants would rectify. We submit, respectfully, that no mortal can so conjure or conceive. By undenied allegation of fact it is shown that the operation of the statutes in question has produced these continuing and additional discriminatory results:

Thirty-five circuit judges of Michigan, all being judges of inferior courts and all being regularly elected for shorter terms than Michigan Supreme Court Justices, are actually receiving substantially higher judicial salaries than are being paid to three Supreme Court judges of the State, plaintiffs being two of the three. These higher circuit court salaries range from $20,000 per annum to $25,001 per annum.

All undisputed facts considered, appellants believe that the questions presented by this appeal are substantial in that their necessitous solution will conduce toward better administration of justice in one of the States, and certainly

to a less rapid turnover of the personnel of that State's highest court. It is therefore submitted that the case calls fairly for plenary consideration.

Respectfully submitted,

THOMAS M. KAVANAGH,
The Capitol,
Lansing, Michigan.

EUGENE F. BLACK,
County-City Building,
Port Huron, Michigan.

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

THOMAS M. KAVANAGH and EUGENE F. BLACK, *Plaintiffs*, v. SANFORD A. BROWN, Treasurer of Michigan, OTIS M. SMITH, Auditor General of Michigan, and IRA POLLEY, Controller of the Michigan State Department of Administration, *Defendants.*	CIVIL ACTION No. 21517

OPINION

A statutory three-judge court was convened pursuant to 28 U.S.C.A. §2281. Jurisdiction is alleged to exist under 28 U.S.C.A. §1331(a).[1] Plaintiffs are two of the eight Supreme Court Justices of the State of Michigan. They assert rights which they claim are protected by the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The three defendants are office holders (at the time of the commencement of this action) of the State of Michigan in the respective ca-

[1] The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

pacities set forth in the title of this action. They filed a motion to dismiss the action and also a motion to strike certain paragraphs of the complaint. This latter motion was heard by the Court and denied. Two weeks thereafter their motion to dismiss the action was heard simultaneously with the hearing on the merits. At said hearing plaintiffs moved to withdraw from their prayer for relief paragraphs 4 and 5, the gist of these being a request for a mandatory injunction ordering the defendant fiscal officers of Michigan to make salary payments according to certain set standards. The motion to withdraw paragraphs 4 and 5 was granted.

The motion to dismiss is based on an alleged lack of jurisdiction. In support of this, defendants set forth five grounds in their motion as follows:

> "1. The District Court of the United States for the Eastern District of Michigan has no jurisdiction, as the complaint does not set forth a cause of action arising under the Constitution, laws or treaties of the United States as is requisite to jurisdiction under United States Code, Title 28, section 1331.
>
> "2. The District Court of the United States for the Eastern District of Michigan has no jurisdiction or judicial power to entertain the action sought to be enforced by the complaint, because it is in essence a suit against the State of Michigan.
>
> "3. The District Court of the United States for the Eastern District of Michigan has no power to issue the coercive writs of mandamus or mandatory injunction sought by the complaint filed herein.
>
> "4. The District Court of the United States for the Eastern District of Michigan has no jurisdiction of the action sought to be enforced by the complaint, as the jurisdictional amount required under United

States Code, Title 28, section 1331, is obtained by aggregating two claims not subject to aggregation.

"5. The District Court for the United States for the Eastern District of Michigan has no jurisdiction of the action sought to be enforced by the complaint as amended, since the matter now in controversy does not equal or exceed the jurisdictional amount of $10,000.00 required under United States Code, Title 28, Section 1331."

As to the first ground, it is difficult to comprehend what defendants have in mind in view of the fact that the complaint is bottomed squarely on an alleged violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. As to the second ground, if it were sound, it would have the effect of rendering ineffective 28 U.S.C.A. §2281. That section provides for exactly such a procedure as we have here, under the same circumstances as are here present. The third ground is, we believe, moot because of plaintiffs' withdrawal of paragraphs 4 and 5 from their prayer for relief. The fourth and fifth grounds are obviously without merit, as the jurisdictional amount is clearly present as to each plaintiff. This is a matter of simple arithmetic. If there still be any doubt as to the jurisdiction of the Court to determine this case on the merits, such doubt must be completely resolved in favor of the existence of jurisdiction in the light of the opinion of the United States Supreme Court delivered March 26, 1962 in the case of *Baker v. Carr*. This Court has jurisdiction to determine the instant controversy.

The prayer for relief, as it remains after the withdrawal of paragraphs 4 and 5, reads as follows:

"Plaintiffs deem themselves entitled to adjudicatory process and relief as follows:

"1. To a permanent injunction restraining the operation and execution of said Act 163 save only on a basis of strict equality of payment of salary to each and all of the member justices of the Michigan Supreme Court.

"2. To a judicial determination that the quoted provision of Article 16 of the Constitution of Michigan, and quoted section 2 of said Act 163, offend plaintiffs' right to equal protection of the laws and that both, as applied to plaintiffs, are invalid.

"3. To a judicial determination that section 2 of said Act 163 is severable from the remainder of the act and, when so severed, that the remainder of the act is valid and fully effective as of its legal date (August 17, 1960).

"6. To a declaratory decree determining that the uniformly sworn status and the uniform duties of all members of the Michigan Supreme Court is such as to require equal compensation to each at all times.

"7. To convocation, pursuant to section 2284 of Title 28, United States Code, of a three judge court; such court to hear and determine the issues presented by this complaint.

"8. To such other and further relief as may be agreeable to equity and good conscience."

The provision of Article 16 of the Constitution of Michigan which plaintiffs claim to be violative of the Equal Protection Clause is Section 3, and reads as follows:

"Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract

entered into. Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

The legislature of the State of Michigan by Act No. 163 of the Michigan Public Acts of 1960 effected a salary increase for justices of the Michigan Supreme Court. The Act provides that "Each justice of the Supreme Court shall receive an annual salary of $25,500.00, payable out of the moneys appropriated by the legislature", and also includes a proviso consistent with the Article 16 provision of the State Constitution. This proviso reads as follows: "Justices of the Supreme Court in office on the effective date of this amendatory act shall not receive any increase in annual salary until the expiration of their respective terms of office." We view the proviso as neither adding to nor subtracting from the prohibition contained in Article 16. If Article 16, §3, is valid, then the proviso is valid; if not, the proviso falls. It has no independent status. The plaintiff justices are required to continue receiving their present salary of $18,500.00 for their respective terms of office. They will, however, be eligible to receive the higher salary of $25,500.00 upon the commencement of new terms of office. Justice Black's present term ends December 31, 1963, and that of Justice Kavanagh, December 31, 1965. It is the contention of plaintiff justices, that because certain members of the court entered the service of the Supreme Court subsequent to the effective date of Act No. 163 and as a result are receiving the increased salary, that the differential in salaries among the eight justices constitutes a discrimination which is repugnant to the Equal Protection Clause so as to render the offending Article 16, §3, of the Michigan Constitution invalid. We are requested to so declare.

Our approach to this problem need not be complex nor many-faceted. There are no disputed factual issues, and the factual picture is simple. There are eight justices serving on the Supreme Court of the State of Michigan. They do not all receive the same or equal compensation. They are all required to render the same or equal services. Some of those who have served longer than others receive less compensation. They are therefore receiving unequal treatment. This is the result of three factors—Article 16, §3, of the State Constitution, Act No. 163 of the Michigan Public Acts of 1960, and the commencement of new terms of office for certain justices subsequent to the effective date of Act No. 163. Plaintiffs have no quarrel with the second and third factors. Act No. 163 provides for an increase in salary. Plaintiffs do not object to this. The fact of the embarkation upon new terms of office for some of the justices is not objected to by plaintiffs. It is the first factor to which plaintiffs voice vigorous objection—Article 16, §3. This is the stumbling block to their getting the benefit of the salary increase during their existing terms of office. This provision they contend denies them the equal protection of the laws as it is guaranteed to them by the Fourteenth Amendment. This contention is not a novel one. Supreme Court of the United States has been called upon to determine, and has determined again and again, whether various types of state legislation[2] which work a discrimination are offensive to the constitutional safeguard. A recent such case is that of *McGowan v. Maryland*, 366 U.S. 420 (1961). The question there present concerned

[2] Constitutional provisions are embraced in the words "State statute" as used in §2281. American Federation of Labor v. Watson, 327 U.S. 582, 592-593 (1948); Alabama Public Service Commission v. Southern Ry. Co., 341 U.S. 341, 343-344, footnote 3 (1951); Wilson v. Beebe, 99 F. Supp. 418, 421 (1951).

the validity of Maryland's Sunday Closing Laws. The language of the Supreme Court contained in Part I of its opinion is equally pertinent here, as is also that contained in several of the cases cited therein by the Court. We proceed here to set forth quotations from opinions of the United States Supreme Court which must be our touchstone for making the present determination:

McGowan v. Maryland, 366 U.S. 420, 425-426 (1961).

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify ..."

Williamson v. Lee Optical Co., 348 U.S. 483, 488-489 (1955):

> "Secondly, the District Court held that it violated the Equal Protection Clause of the Fourteenth Amendment to subject opticians to this regulatory system and to exempt, as §3 of the Act does, all sellers of ready-to-wear glasses. The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and

apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here. For all this record shows, the ready-to-wear branch of this business may not loom large in Oklahoma or may present problems of regulation distinct from the other branch."

Kotch v. Pilot Commissioners, 330 U.S. 552, 556 (1947):

"The constitutional command for a state to afford 'equal protection of the laws' set a goal not attainable by the invention and application of a precise formula. This Court has never attempted that impossible task. A law which affects the activities of some groups differently from the way in which it affects the activities of other groups is not necessarily banned by the Fourteenth Amendment. Otherwise, effective regulation in the public interest could not be provided, however essential that regulation might be. * * * This selective application of a regulation is discrimination in the broad sense, but it may or may not deny equal protection of the laws. Clearly, it might offend that constitutional safeguard if it rested on grounds wholly irrelevant to achievement of the regulation's objectives. An example would be a law applied to deny a person a right to earn a living or hold any job because of hostility to his particular race, religion, beliefs, or because of any other reason having no rational relation to the regulated activities."

Metropolitan Co. v. Brownell, 294 U.S. 580, 582-583 (1935):

"We may assume that the petitioner, by entering the State of Indiana and carrying on business there, is not barred from asserting that its legislation conflicts with the Federal Constitution, and we pass

directly to the single question presented, whether the prohibition applied here to a foreign casualty insurance company infringes the Fourteenth Amendment because it is not likewise applied to domestic companies. Petitioner does not assail the prohibition as not within the scope of the legislative power or as itself so arbitrary or unreasonable as to be a denial of due process. It is not argued, nor could it be on the record before us, that the restriction would be unconstitutional if applied equally to both classes of corporations. Discrimination alone is the target of the attack.

"The equal protection clause does not prohibit legislative classification and the imposition of statutory restraints on one class which are not imposed on another. But this Court has said that not every legislative discrimination between foreign and domestic corporations is permissible merely because th differ, and that with respect to some subjects of legislation the differences between them may afford no reasonable basis for the imposition of a statutory restriction upon foreign corporations, not applied to domestic corporations. The ultimate test of validity is not whether foreign corporations differ from domestic, but whether the difference between them are pertinent to the subject with respect to which the classification is made. If those differences have any rational relationship to the legislative command, the discrimination is not forbidden."

It seems clear from the above that the alleged discrimination must be tested by its relationship to the achievement of the objectives of Article 16, §3, of the State Constitution. The Michigan Supreme Court has spoken clearly and unequivocally in the case of *Vigelius v. Houghton County Clerk*, 317 Mich. 138, decided in 1947. The following quotation from *Barrus v. Engel*, 186 Mich. 540, 544, 545, appears in *Vigelius* at pages 143-144, and we quote it as set forth there:

"'No direct authority upon the exact question presented here is to be found in our decisions. The wisdom of a provision prohibiting any change either by increase or reduction of a public officer's salary during his term has been universally recognized. Such provisions are common in constitutions and statutes of the various States, and the courts have been firm in restraining attempts to evade them. This Court has been in line with the general rule when deciding cases where phases of the question have arisen. *People, ex rel. Douvielle v. Manistee County Supervisors*, 40 Mich. 585; *Anderson v. Hill*, 54 Mich. 477; *Olds v. State Land Office Commissioner*, 134 Mich. 442; *Chase v. Hart*, 162 Mich. 74.

* * *

"'We find here not only the constitutional prohibition, but that in the amendment itself which created this office those empowered to determine the matter of compensation exercised that authority, and declared in express language that no salary or other compensation should attach to the office, and also that the "home-rule law" which authorized the amendment again declares that a city has no power to change the salary or emoluments of a public official after his appointment or election.

"'Restrictive provisions of this class are universally recognized as in the interest of good government and founded on sound reasons of public policy. They are adopted for the two-fold purpose of protecting the public by restraining those in office from taking advantage of their positions and official influence to unduly secure added compensation not contemplated and to which they were not entitled when they were selected for and accepted office, and also to secure each individual officer in enjoyment of the emoluments provided and rightfully to be expected when he accepted his office, by protecting him from any unfriendly power which might, for any reason, otherwise reduce or abolish them.'"

An expression from the highest court of a sister state to the same effect is to be found in the case of *The State, ex. rel., Mack, Judge v. Guckenberger*, Aud., 139 Ohio St. 273, 278 (1942) where the Court spoke as follows:

> "The purpose of the constitutional inhibition now under consideration is to make sure that the judge and the electorate are advised before he is appointed or elected what his compensation will be, with the assurance that it cannot be changed by the Legislature during the term; that the judge is precluded from using his personal influence or official action to have the Legislature increase his salary; and that at the same time he is protected against the Legislature and the people from decreasing his compensation after his term begins. These same salutary purposes are fully and effectually preserved by the terms of the present statute, *albeit* the compensation of the judge is made variable, from and after the last federal census becoming effective during his term."

Need we expound further? Our view as to the wisdom of the provision is of no account. Our view as to its fairness as applied in the instant case is of no account. Our function is to apply the law as laid down by the United States Supreme Court. We are convinced that according to its precepts we may not here declare Article 16, §3, to be violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. "It is a salutary principle of judicial decision, long emphasized and followed by this Court, that the burden of establishing the unconstitutionality of a statute rests on him who assails it, and that courts may not declare a legislative discrimination invalid unless, viewed in the light of facts made known or generally assumed, it is of such a character as to preclude the assumption that the classification rests upon

some rational basis within the knowledge and experience of the legislators. A statutory discrimination will not be set aside as the denial of equal protection of the laws if any state of facts reasonably may be conceived to justify it." *Metropolitan Co. v. Brownell*, 294 U.S. 580, 584 (1935). We are not convinced that an apparently reasonable basis for the alleged discrimination does not exist, or that the statutory (constitutional) discrimination is invidious. We are unable to say that this provision does not provide equal protection of the laws.

An appropriate decree may be presented.

Lester L. Cecil,
United States Circuit Judge.

Thomas P. Thornton,
United States District Judge.

Fred W. Kaess,
United States District Judge.

Dated: June 18, 1962.

A true Copy:

John J. Ginther, Clerk,
By: Kathleen Farnsworth,
Deputy Clerk.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

THOMAS M. KAVANAGH and EUGENE F. BLACK, *Plaintiffs*, v. SANFORD A. BROWN, Treasurer of Michigan, OTIS M. SMITH, Auditor General of Michigan, and IRA POLLEY, Controller of the Michigan State Department of Administration, *Defendants*.	CIVIL ACTION No. 21517

ORDER AND DECREE

This cause having been duly and finally submitted to a court of three judges composed of the Honorable John D. Martin, United States Circuit Judge for the Sixth Circuit, the Honorable Thomas P. Thornton and the Honorable Fred W. Kaess, United States District Judges for the Eastern District of Michigan, and

Plaintiffs having thereafter, on March 22, 1962, filed their "Application for Interlocutory Injunction" restraining the defendant fiscal officers, until further order, from continuing to pay unequal salaries to members of the Supreme Court of Michigan, and

The Honorable Thomas P. Thornton, with the concurrence of Judges Martin and Kaess having issued a temporary restraining order dated March 23, 1962, which has heretofore been dissolved by separate order of June 28, 1962, and

The Honorable John D. Martin, United States Circuit Judge, having died April 2, 1962 prior to final determination of the issues, and the Honorable Lester L. Cecil, United States Circuit Judge for the Sixth Circuit, having been duly designated on April 23, 1962 to serve as the circuit judge on this three-judge court, and

The parties to this cause having stipulated that the issues presented be resubmitted without further argument or briefs to such newly composed court on the record and briefs existent on the date of such stipulation, and

Said newly composed three-judge court having filed its opinion on June 18, 1962 determining that this Court has jurisdiction to decide this case on the merits, and that therefore defendants' motion to dismiss should not be granted, and determining that the alleged statutory (constitutional) discrimination against plaintiffs does not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States,

It is ordered and decreed:

That defendants' motion to dismiss be, and the same is hereby denied,

That Section 3 of Article 16 of the Constitution of the State of Michigan does not deny to plaintiffs the equal protection of the laws as guaranteed to them by the Fourteenth Amendment to the Constitution of the United States.

That plaintiffs are not entitled to any of the relief as prayed for in their Complaint.

/s/ Lester L. Cecil,
United States Circuit Judge.

/s/ Thomas P. Thorton,
United States District Judge.

/s/ Fred W. Kaess,
United States District Judge.

July 11, 1962.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1962

THOMAS M. KAVANAGH and EUGENE F. BLACK, Appellants vs. SANFORD A. BROWN, Treasurer of Michigan, et al., Appellees	No. 299

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing a complaint seeking temporary and permanent injunctive relief against the appellees as fiscal officers of the State of Michigan from their acts of

paying unequal salaries to members of the Michigan Supreme Court. The cause was fully argued and submitted to a statutory three-judge court. No oral testimony was taken. Judgment was entered on July 11, 1962 dismissing the complaint on the merits.

The State Constitution and Statutory Provisions.

Appellants challenge the validity of Section 3, Article XVI of the Michigan Constitution of 1908 on the ground that its provisions deny to the appellants equal protection in violation of the equality clause of the Fourteenth Amendment. Section 3 of Article XVI in its entirety reads:

> "Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract entered into. Salaries of public officers, except circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

Appellants complain that as two members of the eight-member Michigan Supreme Court, all "sworn to equal toil upon the same judicial product," they are discriminated against because the increase in the annual salary of Supreme Court justices authorized in 1960 has become available to five other members of the Court but will not become available to them during the remainder of their respective terms. The predicament in which the appellants find themselves is brought about by another provision of the Michigan Constitution which requires the justices of the Supreme Court to be elected on the basis of staggered terms thereby making it impossible for all the justices to be paid simultaneously at an increased rate, after election. Section 2 of Article VII of Michigan's Constitution of 1908 provides:

> "The supreme court shall consist of 1 chief justice and associate justices, to be chosen by the electors of the state at the regular biennial spring elections; and not more than 2 justices shall go out of office at the same time. The term of office shall be prescribed by law."

By statute, the composition of the Michigan Supreme Court consists of one chief justice and seven associate justices. (Compiled Laws of 1948, Section 601.1; Michigan Statutes Annotated, Section 27.21.) The number remained unchanged throughout the period involved in this cause.

Michigan's organic law has contained provisions against raising or lowering salaries of public officers "since earliest times." Such proscriptions appeared in the Michigan Constitution of 1835; the Constitution of 1850, and the present Constitution of 1908. Attached as Appendix A are quoted pertinent sections from each of the three Constitutions. A schedule showing the salaries paid to justices of Michigan's Supreme Court since the time its was established in its present form is subjoined hereto as Appendix B.

The Michigan legislature made an attempt in 1951 to remove the justices of Michigan's Supreme Court from the no increase limitation of the last sentence of Section 3 of Article XVI of the State Constitution. In that year the legislature passed Joint Resolution No. 3 (Michigan Public Acts 1951, page 592). The Joint Resolution proposed to the people an amendment to the last sentence of Section 3 so that it would read:

> "Salaries of public officers, except supreme court justices and circuit judges, shall not be increased, nor shall the salary of any public officer be decreased, after election or appointment."

The people voted on the proposed amendment at the election of April 2, 1951 and rejected it by a vote of 315,140 Against and 276,632 For. (Michigan Manual 1959-1960, page 80)

In the next year, 1952, the legislature by Act No. 140 amended Section 6 of Chapter 1 of the Judicature Act of 1915 to increase the annual salary of Supreme Court justices from $12,000 per annum to $18,500 per annum. Act No. 140 was given immediate effect and became effective April 24, 1952. It contained a Section 2 reading as follows:

> "Justices of the supreme court in office on the effective date of this amendatory act shall not receive any increase in annual salary until the expiration of their respective terms of office."

In 1957 the Michigan Supreme Court by unanimous action addressed a resolution to the state legislature directing attention to the provisions of Section 3 of Article XVI of the State Constitution prohibiting a salary change from taking effect during a term of office and requesting the assistance of the legislature in adopting the form of a proposed Joint Resolution submitted by the Court seeking to amend Section 2 of Article VII (staggered term requirement) by adding thereto the following additional sentence:

> "Whenever the legislature shall authorize an increase in the salaries of justices, the increase shall become operative at the beginning of the next fiscal year for all justices alike whether authorized before or after their election or appointment."

The communication from the Supreme Court to the state legislature is reported in Michigan Senate Journal 1957, Vol. 1, pp. 128 and 129. It is reproduced as Appendix C attached hereto. The House of Representatives of the Mich-

igan Legislature passed House Joint Resolution "E" embodying the proposal by the Supreme Court to amend Section 2 of Article VII of the State Constitution (Michigan House Journal 1957, Vol. 1, p. 322 et seq.). The resolution was defeated in the Senate. (Senate Journal 1957, Vol. 1, pp. 912, 913)

In 1960 the Michigan legislature by Act No. 163 again amended the Judicature Act of 1915 to increase the annual salary of Supreme Court justices from $18,500 to $25,500. Section 2 appearing in Act No. 163 of 1960 was identical with Section 2 appearing in Act No. 140 of 1952.

Decision Below and Basis Therefor.

Act No. 163 of the Michigan Public Acts of 1960 increasing the salaries of justices of the Supreme Court to $25,500 per annum became effective on August 17, 1960. Appellants, as plaintiffs, filed their complaint on August 11, 1961. Mr. Justice Theodore Souris, a member of the Michigan Supreme Court, began to receive the increased salary on November 9, 1960 after his election and qualification for the balance of an unexpired term. Mr Justice Otis M. Smith was appointed to the Court on October 10, 1961 to fill a vacancy and was compensated at the increased salary. Having been re-elected, Mr. Justice John R. Dethmers and Mr. Justice Harry F. Kelly entered upon new terms of office on January 1, 1962 and began receiving the increase in their former salaries effective on that date. Mr. Justice Paul L. Adams was appointed on January 2, 1962 to fill a vacancy and has always been compensated at an annual rate of $25,500.

The three-judge district court in its opinion gave no credit to Section 2 of Act No. 163, Michigan Public Acts of 1960,

as imposing any additional restriction upon the payment of increased salaries to the justices. The three-judge court treated Section 2 of Act No. 163 as a proviso, and in its opinion disposed of it in this way:

> "We view the proviso as neither adding to nor subtracting from the prohibition contained in Article 16. If Article 16, § 3, is valid, then the proviso is valid; if not, the proviso falls. It has no independent status." (Jurisdictional Statement, page 27)

In deciding the case on its merits, the three-judge district court relied upon the opinions of this Court in the cases of

> *McGowan v. Maryland*, 366 U.S. 420;
>
> *Williamson v. Lee Optical Co.*, 348 U.S. 483;
>
> *Kotch v. Pilot Commissioners*, 330 U.S. 552; and
>
> *Metropolitan Co. v. Brownell*, 294 U.S. 580

as determinative of the issue of the reasonableness of the classification within the equality clause. The three-judge court followed the pronouncements of the Michigan Supreme Court in *Vigelius v. Houghton County Clerk*, 317 Mich. 138 and the Supreme Court of Ohio in *The State, ex rel., Mack, Judge v. Guckenberger, Aud.*, 139 Ohio St. 273, as to the salutary purposes and public policy to be served through the adoption of constitutional restraints upon the increase or decrease of the salaries of public officers during their term of office.

The statutory court concluded its opinion by saying:

> "We are not convinced that an apparently reasonable basis for the alleged discrimination does not exist, or

that the statutory (constitutional) discrimination is invidious. We are unable to say that this provision does not provide equal protection of the laws." (Jurisdictional Statement, page 34).

ARGUMENT

It is admitted that presently a discrimination exists in Michigan in the annual rate of salary being paid to the justices of the Supreme Court in that five of the justices are compensated at the rate of $25,500 per annum while three are still being paid at the former rate of $18,500. Such condition is the inevitable consequence of the thrust of the two Michigan constitutional provisions requiring the election of Supreme Court justices by staggered terms and prohibiting any increase or decrease in salary of public officers after election or appointment. But discrimination in fact is not necessarily invidious or violative of the equality clause and the present disparity is but temporary.

On May 29, 1961 this Court decided the Sunday Closing Cases:

McGowan v. State of Maryland, 366 US 420;

Two Guys From Harrison-Allentown, Inc. v. McGinley, District Attorney, 366 US 582;

Braunfeld v. Brown, Commissioner of Police, 366 US 599;

Gallagher, Chief of Police v. Crown Kosher Super Market of Massachusetts, Inc., 336 US 617.

Mr. Justice Frankfurter filed a separate concurring opinion applicable to all four cases. Concerning the challenge

that the equal protection clause was violated, he announced applicable law in these words—

> "The restricted scope of this Court's review of state regulatory legislation under the Equal Protection Clause is of long standing. Lindsley v. Natural Carbonic Gas Co. 220 US 61, 78, 79, 55 L ed 369, 377, 378, 31 S Ct 337, Ann Cas 1912C 160. The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality." (366 US 534)

The Michigan Supreme Court has upheld the provisions of the Michigan Constitution in the case of *Taylor v. Auditor General*, 360 Mich. 146 (1960) involving a claim by a former judge of a Superior Court for additional salary. Mr. Justice Talbot Smith, writing for the majority of the Michigan Court, said:

> "The adoption of the original constitutional clauses respecting changes in salaries of public officials during their terms of office resulted from interference with the independence of the judiciary through the power of the purse during Revolutionary times. This was one of the principal causes of complaint in this era. The Declaration of Independence itself, setting forth the tyrannies of the English king, asserted that: 'He has made judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries.'

As a result most State constitutions, as well as the Federal, contain provisions seeking to protect judicial, or, in some cases, all public officials' salaries from alteration, in one form or another, by the legislatures.

"Thus we have, in this State, a constitutional provision forbidding the increase, except for 'circuit judges,' or the decrease, of the salaries of public officers after their election or appointment. Such a provision must inevitably result, in event of salary increases, in subsequent salary differences between judges, other than circuit judges, elected for non-simultaneous terms. There is no doubt, then, that an actual inequality as to salary may exist between those occupying the same office and doing the same work. But is this an unconstitutional inequality, that is to say, an inequality offensive to constitutional principles? That will depend upon the reason and purpose of the provision creating the inequality. Here the constitutional draftsmen must weigh the actual inequality conceded to exist at times against the evils conceivably attendant upon a lack of such provision. The purpose of such provisions, according to Alexander Hamilton, was to restrict the power of the legislature, so that it could 'neither weaken [the public officer's] fortitude by operating on his necessities, nor corrupt his integrity by appealing to his avarice.' Whether such provisions outweigh considerations of arguable injustice to public officials elected for long terms has been a matter of debate, as has the extent or severity of the clause forbidding change.

"But the debate, for us, has been resolved. The constitutional provision against raising or lowering salaries is, as we have noted, a common feature of many State constitutions, including that of our State, as well

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as the Federal. These provisions have been a part of the several constitutions since earliest times. They have been construed again and again, as reference to any standard digest will disclose." (pp. 154, 155, 156)

In the *Taylor* case Mr. Justice Kavanagh concurred in the result on a procedural ground. Mr. Justice Black dissented.

Appellants emphasize that the proscription against salary increases has been added by legislation. Attention is respectfully directed to the fact that the language of Section 2 of Act No. 140 passed in 1952 is identical with the language of Section 2 of Act No. 163 passed in 1960, which the appellants now attack. What motive provoked the legislature to attach the Section 2 proviso to each of these acts is conjectural but it is suggested as a fair and reasonable assumption that the legislature by so doing undertook to make crystal clear its intention of complying with the mandate of the people in their rejection of the 1951 proposed amendment to the Constitution to exempt supreme court justices from the no increase limitation.

Appellants make the point in their Jurisdictional Statement (pages 5 and 6) that the statute as amended by Act No. 163 of 1960 was repealed by the legislature during its session of 1961. In fairness, it is to be observed that the repeal came about as a part of the process of enactment of an entire Revised Judicature Act in Michigan. Michigan Public Act No. 236 of 1961 is known and may be cited as the "Revised Judicature Act of 1961." (Sec. 27A.101 et seq. Michigan Statutes Annotated, published by Callaghan & Company as a separate temporary volume). Michigan's Revised Judicature Act was the product of more than three years of study and drafting by the Joint Committee on

Michigan Procedural Revision composed of justices of the Supreme Court, judges of the inferior courts, and members of the State Bar.

The repeal in the Revised Judicature Act of 1961 of the former statute which had been amended by Act No. 163 of 1960 does not help the appellants so long as the Michigan Constitution of 1908 remains in effect and Section 3 of Article XVI thereof is unchanged. The Michigan Supreme Court by its resolution to the legislature in 1957, the legislature itself by its attempt to pass a joint resolution in the same year and the three-judge district court by its opinion in this cause all took the view that the no increase proscription is a part of Michigan organic law and not the product of legislative enactment. The Joint Committee on Michigan Procedural Revision took the same view.

By their second stated question of the Questions Presented, (Jurisdictional Statement, pages 6 and 7) appellants ask whether the exemption of circuit judges from the no increase provision in Section 3 of Article XVI of Michigan's Constitution, invidiously discriminates against unequally treated members of the Supreme Court. In Michigan the circuit judges are the trial judges. The State is divided into 41 judicial circuits, composed of one or more counties. Circuit judges are elected and the number of such judges varies among the circuits, the greatest number being 18 in Wayne County, where Detroit is located. Circuit judges are compensated by the State at a uniform rate by salary paid from the state treasury. The state-paid salary may be supplemented by additional salary appropriated by the board of supervisors of the county or counties within the judicial circuit. Section 12 of Article VII of the Michigan Constitution of 1908 provides:

"Section 12. Each of the judges of the circuit courts

shall receive a salary payable monthly. In addition to the salary paid from the state treasury, each circuit judge may receive from any county in which he regularly holds court such additional salary as may be determined from time to time by the board of supervisors of the county. In any county where such additional salary is granted it shall be paid at the same rate to all circuit judges regularly holding court therein."

In fixing the county-paid portion of the salary, if any, the board of supervisors is performing a legislative act. *Rathbun v. Board of Supervisors*, 275 Mich. 479, 481.

The foregoing provision was written into Michigan's Constitution of 1908 in recognition of the wide variety of conditions, economic and otherwise, existing between the counties of the State which go to make up the judicial circuits. The wisdom of such a provision was fully discussed in the Constitutional Convention. As an historical reference, we attach hereto as Appendix D pertinent extracts of the Debates on this issue by the delegates to the Constitutional Convention which adopted this constitutional section. Adequate reasons appear in Michigan for the exclusion of circuit judges from the no increase provision of Section 3, nor do these reasons require equal treatment of the members of the Supreme Court. Although the salaries of circuit judges may be increased after election or appointment, they cannot be decreased any more than the salaries of any other public officers. In passing, it may be observed that not one of the circuit judges of the State of Michigan has been named as a party to this suit.

Beginning with the first increase in the annual salaries of Supreme Court justices subsequent to the adoption of the 1908 Constitution, authorized by the legislature in 1921, the State of Michigan has uniformly and without deviation except while under a temporary restraining order

in this cause paid the amount of the increased compensation only to those Justices who have entered upon a new term of office pursuant to election or who have been appointed subsequent to the effective date of the increasing authorization. The Michigan Supreme Court has said, concerning the last sentence of Article [redacted], §3:

> "The mandate applies to all public officers having fixed terms and to all salary-fixing bodies."
>
> *Gillespie v. Board of County Auditors of Oakland County*, 267 Mich. 483, 485.

Up to the time of the present suit, the justices of the Michigan Supreme Court have considered themselves bound by the no increase-decrease provision and have acquiesced in its application to salary increases granted by the legislature. An example of the processing of the 1921 increase of the salary rate from $7,000 to $10,000 is shown on the tabulation marked as Appendix E and attached hereto.

Compensation to a public officer is a matter of statute, not of contract, and is incidental to office. The inequity in salary payments alleged by Justices Kavanagh and Black is a reasonable and necessary result of every prohibition similar to that in the Michigan Constitution against increases of salaries of public officers during their terms. Mr. Justice Van Devanter, writing for this Court, laid down the accepted standards by which classifications are to be tested in his opinion in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78:

> "The rules • • • are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police

laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

The reasonableness of a no increase-decrease provision as applied to the salaries of public officers elected or appointed for a fixed term seems obvious. Fundamentally it is a control of the power to reward or to punish during the incumbent's term through the device of salary adjustment.

In Michigan, the Supreme Court in discussing Section 3 of Article XVI, has said:

"The inhibition against the raising or lowering of salaries applies only to the definite, and not to the indefinite term of an offical. * * * One of the reasons for the rule that an official's salary cannot be reduced during his definite term is to prevent the use of an indirect method to discharge an official during such term by the subterfuge of reducing his salary."

Bodell v. City of Battle Creek, 270 Mich. 445, 447, 448.

In the later case of *Drolshagen v. County of Wayne*, 283 Mich. 569, the Michigan Supreme Court was equally divided on the issue before it as to whether the register of probate held a definite or indefinite term of office because the probate judge had the power to remove him at will. In the opinion of Mr. Justice Butzel the reasoning quoted above from *Bodell v. City of Battle Creek* was followed and expanded:

> "Where it is shown that a public officer may be removed at the pleasure of the officer who appointed him and who must have complete control over his actions and conduct, there is no reason for prohibiting an alteration in his compensation. Since control may be exercised over his actions directly by removal, it cannot be complained that the indirect exercise of such power, by reduction in salary, is improper. If the officer is unwilling to accept a reduction, he may resign. If he is not willing to do either, he may be discharged for that reason alone." (p. 576)

Appellees respectfully submit that the Michigan constitutional provisions against salary increases to public officers and requiring Supreme Court justices to be elected by staggered terms are not obviously arbitrary and so patently without reason that no conceivable situation of fact can be found to justify them. The burden of showing invidious discrimination is upon the appellants and in this they have failed.

Recently this Court in the majority opinion written by Mr. Justice Clark in the case of *David Beck v. Washington*, 369 U.S. 541, 558, decided May 14, 1962, quoted with approval from *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462, as follows:

> "'While this Court stands ready to correct violations of constitutional rights, it also holds that "it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality." *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 462 (1956). This burden has not been met.'"

We add that the quotation from the *Handy* case finds its origin in *Adams v. United States*, 317 U.S. 269, 281, in the opinion written by Mr. Justice Frankfurter:

> "If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a matter of speculation but as a demonstrable reality."

We recognize that the above quotations appeared where the asserted claim was lack of due process but we can conceive of no reason why the same standard should not be applied where the challenge is predicated on the equality clause.

CONCLUSION

The decision below is correct and this appeal presents no question warranting plenary review by this Court. The judgment of the three-judge district court should be affirmed.

Respectfully submitted,

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The Capitol, Lansing, Michigan

August 1962.

APPENDIX A

SET FORTH BELOW ARE THE PERTINENT SECTIONS FROM THE THREE MICHIGAN CONSTITUTIONS SHOWING THE DEVELOPMENT AND PATTERN OF THE CONSTITUTIONAL RESTRICTIONS AGAINST INCREASING OR DECREASING THE SALARY OF PUBLIC OFFICERS DURING THEIR TERM OF OFFICE.

CONSTITUTION OF 1835

The Constitution of 1835 contained no "catch-all" provision regarding increasing or diminishing salaries of public officers during their term of office. It did say:

1. Members of the legislature—Article IV, Section 18

"The members of the legislature shall receive for their services, a compensation to be ascertained by law, and paid out of the public treasury; but no increase of the compensation shall take effect during the term for which the members of either house shall have been elected; and such compensation shall never exceed three dollars a day."

2. Governor—Article V, Section 18

"The governor shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the term for which he has been elected."

3. Supreme Court Judges—Article VI, Section 2

"The judges of the supreme court shall hold their offices for the term of seven years; they shall be nominated, and by and with the advice and consent of the senate, appointed by the governor. They shall receive an adequate compensation, which shall not be diminished during their continuance in office. But they shall receive no fees nor perquisites of office, nor hold any other office of profit or trust under the authority of this state or of the United States."

CONSTITUTION OF 1850

1. Circuit Judges—Article VI, Section 6

"The State shall be divided into judicial circuits, in each of which the electors thereof shall elect one circuit judge who shall hold his office for the term of six years, and until his successor is elected and qualified. The legislature may provide for the election of more than one circuit judge in the judicial circuit in which the city of Detroit is or may be situated, and in the judicial circuit in which the county of Saginaw is or may be situated, and in the judicial circuit in which the county of Kent is or may be situated, and in the judicial circuit in which the county of St. Clair is or may be situated. And the circuit judge or judges of such circuits, in addition to the salary provided by the constitution, shall receive from their respective counties such additional salary as may from time to time be fixed and determined by the board of supervisors of said county. And the board of supervisors of each county in the Upper Peninsula, and in the counties of Bay, Washtenaw, Genesee,

Ingham and Jackson and the counties in the judicial circuit in which the county of Isabella is or may be situated in the Lower Peninsula, is hereby authorized and empowered to give and to pay the circuit judge of the judicial circuit to which said county is attached, such additional salary or compensation as may from time to time be fixed and determined by such board of supervisors. This section as amended shall take effect from the time of its adoption."

2. Salaries of state officers—Article IX, Section 1

"The governor shall receive an annual salary of four thousand dollars; the judges of the circuit court shall each receive an annual salary of two thousand five hundred dollars; the state treasurer shall receive an annual salary of one thousand dollars; the superintendent of public instruction shall receive an annual salary of one thousand dollars; the secretary of state shall receive an annual salary of eight hundred dollars; the commissioner of the land office shall receive an annual salary of eight hundred dollars; the attorney general shall receive an annual salary of eight hundred dollars. They shall receive no fees or perquisites whatever for the performance of any duties connected with their office. It shall not be competent for the legislature to increase the salaries herein provided."

3. County officials—Article X, Section 10

"The board of supervisors, or in the counties of Saginaw, Jackson, Washtenaw, Kent, Wayne, Genesee, Bay, Cheboygan and St. Clair the board of county auditors, shall have the exclusive power to fix the compensation for all services rendered for and to adjust all claims against their respective counties, and

the sums so fixed and defined shall be subject to no appeal."

4. Increases or decreases prohibited during term—Schedule, Section 20

"The salaries or compensation of all persons holding office under the present constitution shall continue to be the same as now provided by law, until superseded by their successors elected or appointed under this constitution; and it shall not be lawful hereafter for the legislature to increase or diminish the compensation of any officer during the term for which he is elected or appointed."

CONSTITUTION OF 1908

1. Members of the legislature—Article V, Section 9 in the original Constitution read:

"The compensation of the members of the legislature shall be eight hundred dollars for the regular session. When convened in extra session their compensation shall be five dollars per day for the first twenty days and nothing thereafter. Members shall be entitled to ten cents per mile and no more for one round trip to each regular and special session of the legislature by the usually traveled route. * * *"

The foregoing section has been amended twice. In its present form it reads:

"The compensation and expenses of the members of the legislature shall be determined by law: Provided, That no change in compensation or expenses shall be

effective during the term of office for which the legislature making the change was elected. * * *"

2. Salaries of state officers—Article VI, Section 21 in the original Constitution read:

"The governor and attorney general shall each receive an annual salary of five thousand dollars. The secretary of state, state treasurer, commissioner of the state land office and auditor general shall each receive an annual salary of twenty-five hundred dollars. They shall receive no fees or perquisites whatever for the performance of any duties connected with the offices. It shall not be competent for the legislature to increase the salaries herein provided."

The foregoing section was amended in 1948 and in its present form reads:

"The governor, secretary of state, state treasurer, auditor general, and attorney general shall each receive such compensation as shall be prescribed by law which shall be in full for all services performed and expenses incurred during his term of office: Provided, That the same shall not be changed during the term of office for which elected."

3. Circuit Court judges—Article VII, Section 12

"Each of the judges of the circuit courts shall receive a salary payable monthly. In addition to the salary paid from the state treasury, each circuit judge may receive from any county in which he regularly holds court such additional salary as may be determined from time to time by the board of supervisors of the county. In any county where such additional

salary is granted it shall be paid at the same rate to all circuit judges regularly holding court therein."

APPENDIX B

SCHEDULE OF SALARIES PAID TO SUPREME COURT JUSTICES

Year	Annual Salary	Statutory Authorization
1857	$ 2,500.00 each	Laws of 1857, p. 393, §14; CL 1857 §3378
1873	$ 4,000.00 each	Laws of 1873, p. 1; Howell's Annotated Statutes, Vol. II, §6393
1887	$ 5,000.00 each	PA 1887, Act No. 96
1893	$ 7,000.00 each	PA 1893, Act No. 182
1915	Section 6 of Chapter 1 of the Judicature Act of 1915 (being Act No. 314) fixed the salary of each justice at $7,000.00 annually. The subsequent acts increasing the amount of the salary amend Section 6 of Chapter 1.	
1921	$10,000.00 each	PA 1921, Act No. 345
1929	$12,000.00 each	PA 1929, Act No. 20; CL 1929 §13532
1952	$18,500.00 each	PA 1952, Act No. 140

Explanatory note: This act contained a Section 2 reading as follows:

"Justices of the supreme court in office on the effective date of this amendatory act shall not receive any

increase in annual salary until the expiration of their respective terms of office."

1960 $25,500.00 each PA 1960, Act No. 163

Explanatory note: This act contained a Section 2 reading as follows:

"Justices of the supreme court in office on the effective date of this amendatory act shall not receive any increase in annual salary until the expiration of their respective terms of office."

APPENDIX C

Extract from Michigan Senate Journal 1957, Vol. 1, pages 128, 129.

"Communications from State Officers.

"The following communication was received and read:

Supreme Court, Lansing, Michigan,
February 4, 1957.

To the Members of the Legislature:

"This Court, by unanimous action, authorized submission to you of the annexed proposed Joint Resolution No. 1, proposing a constitutional amendment to equalize the salaries of Justices of the Supreme Court.

"Currently two, and in recent times three different salary scales have been been in effect for different members of this Court. With eight year, staggered

terms it is inevitable that that situation will obtain for a number of years following each salary change, because of the provision of Section 3 of Article 16 of the state Constitution prohibiting such change from taking effect during term of office. The proposed amendment herewith submitted would correct that situation and serve to equalize the salaries of all members of the Court by making any increase applicable to all at the same time at the beginning of the next fiscal year.

"It is manifestly inequitable and improper that the amount of compensation paid some Justices should differ from that paid others for performance of the same service. Furthermore, the rapidity of economic change since World War II and extent thereof occurring within a span of eight years are such that adequate compensation at the outset of an eight year term becomes grossly inadequate long before its expiration. The last increase in salaries of Justices of this Court, in 1952, had hardly begun to place them on an equality with those of the Wayne County Circuit Judges when quickly ensuing increases of the latter had left salaries on this Court $6,500.00 below those of that Court and, as well, $5,000.00 below those of the Oakland Circuit Judges and $500.00 below those in Macomb. As appears from the 1956-57 issue of the Book of the States, in no other state in the Union, except perhaps Texas, are salaries of the lower courts equal to or in excess of those of the state's court of last resort.

"We earnestly bespeak the assistance of the Legislature by its adoption of the attached Joint Resolution No. 1.

"Also attached is a second proposed Joint Resolution proposing a constitutional amendment authorizing the

temporary assignment, by this Court, of retired Circuit Judges, with their consent, for special service to circuits where assistance is needed. This would accomplish the utilization of available judicial skills in circuits where case loads require additional judicial services, thus saving taxpayers the cost of permanently added judges and Courts. This is submitted with no thought of advantage to this Court or even to the retired Judges affected, but only in the interests of better, more efficient and more economical service to the public.

Respectfully

JOHN R. DETHMERS,
Chief Justice."

"No. 1.

"A joint resolution proposing an amendment to section 2 of article 7 of the state constitution, to equalize the salaries of Justices of the Supreme Court.

"Resolved by the Senate and House of Representatives of the State of Michigan, That the following amendment to section 2 of article 7 of the state constitution to equalize the salaries of Justices of the Supreme Court, is hereby proposed, agreed to and submitted to the people of this state:

Article VII

"Sec. 2. The Supreme Court shall consist of one chief justice and associate justices, to be chosen by the electors of the state at the regular biennial spring elections; and not more than two justices shall go out of office at the same time. The term of office shall be prescribed by law. WHENEVER THE LEGISLATURE

SHALL AUTHORIZE AN INCREASE IN THE SALARIES OF JUSTICES, THE INCREASE SHALL BECOME OPERATIVE AT THE BEGINNING OF THE NEXT FISCAL YEAR FOR ALL JUSTICES ALIKE WHETHER AUTHORIZED BEFORE OR AFTER THEIR ELECTION OR APPOINTMENT."

• • •

[Proposed Joint Resolution No. 2 submitted by the Supreme Court related to a constitutional amendment authorizing temporary assignment by the Supreme Court of retired Circuit Judges to special service in circuits where assistance is needed. Not being pertinent, it is omitted.]

APPENDIX D

The following extracts are taken from the Debates of the Michigan Constitutional Convention of 1907-08.

The Committee on Arrangement and Phraseology proposed to the Convention a revised section to be incorporated in the new Constitution and to read as follows:

"Sec. ___. Neither the legislature nor any municipal authority shall grant or authorize extra compensation to any public officer, agent, employe or contractor after the service has been rendered or the contract entered into. Salaries of public officers shall neither be increased nor decreased after their election or appointment."

In the debates that followed on the floor of the Convention it was said:

"MR. KNOWLES: Mr. President, I move to strike out the entire clause two of this proposal.

"The question being on the motion,

"MR. KNOWLES said: Mr. President and gentlemen of the Convention: I am rather reluctant to suggest any changes to any proposal that comes out from the committee, but it seems to me that this clause if passed will bring about a very serious mistake. 'Salaries of public officers shall neither be increased nor diminished after their election or appointment.'

"By referring to Section 6 of Article VI of the old Constitution, we find that in this article the legislature is given power for the election of more than one circuit judge in a judicial circuit in which the city of Detroit is situated, in which Saginaw is situated, and in which Grand Rapids is situated, as well as St. Clair county. This provision goes on to state that 'the circuit judge or judges of such circuits, in addition to the salary provided by the Constitution, shall receive from their respective counties such additional salary as may from time to time be fixed and determined by the board of supervisors of said county.' Amendments have been made to this Constitution at various times; in the same section the board of supervisors of each county in the Upper Peninsula and in the counties of Bay, Washtenaw, Ingham, Genesee and Jackson, and the counties in the judicial circuit in which the county of Isabella is or may be situated, have this same provision.

"The people of the state considered it of sufficient importance to amend the Constitution in all of these cases and give the judges additional salaries so that at the present time we have in the state of Michigan

twenty-three circuit judges who are receiving additional salaries, I mean over and above the twenty-five hundred dollars provided for in this Constitution. It seems to me that if this clause two is adopted it will interfere with additional salaries being paid to judges. The proposal which has been reported today by the Judiciary Committee, as a recommendation of the alteration of Section 6 Article VI for the new Constitution will provide that the legislature may sanction the election of more than one circuit judge in any judicial circuit, and that each circuit judge, in addition to the salary provided by the state, may receive from the respective counties comprising such circuit, such additional salary as may from time to time be determined by the boards of supervisors of said counties. In other words, it places Section 6 Article VI in such a way that if at any time a judge should receive an additional salary, as twenty-three of our judges do now receive, the board of supervisors may vote this extra compensation without an amendment to the Constitution. If that is to be a provision in the new Constitution, certainly then clause two which states that 'Salaries of public officers shall neither be increased nor diminished after their election or appointment,' will conflict with it. I make my motion to strike out this clause and leave the proposal in the same condition as it was in the old Constitution, which will allow the boards of supervisors to vote additional salary for circuit judges.

"MR. H. M. CAMPBELL: Mr. President, when the question was asked of me as chairman of the Committee on Legislative Department, as to what the effect would be of this provision upon the proposal which Mr. Knowles has just referred to as being under consideration, I was unable to answer him because I had not then seen either proposal. Since that time, however, I

have examined the proposal, and I am inclined to think there might be a serious doubt as to whether it would not conflict with this section if permitted to remain as reported out by the committee. I think that all of us recognize the desirability of permitting the salaries of circuit judges to be increased in the manner in which this proposal which is now before the Judiciary Committee contemplates; and I can see no harm, and in fact I can see a decided advantage in striking out this clause two as proposed by Mr. Knowles in order to accomplish that purpose.

"MR. SNOW: Mr. President, to obviate the difficulty suggested by Mr. Knowles I move as an amendment to the amendment that after the words 'public officers' there be inserted the words 'except circuit judges.' So that clause two will then read: 'Salaries of public officers, except circuit judges, shall neither be increased nor diminished after their election or appointment.'

"It is seriously contended that this would conflict with the provision that permits circuit judges' salaries to be raised, or additional compensation to be given them, but for that reason clause two ought not to be striken out entirely, because it is a good provision, and if it does conflict with it this would obviate the conflict, and in my opinion it should be passed with the provision inserted.

"THE PRESIDENT: The question is on the amendment of the gentleman from Saginaw (Mr. Snow).

"MR. HEALD: Mr. President and gentlemen of the Convention: I hope that neither the amendment nor the amendment to the amendment will prevail.

"In Kent county the circuit judges receive additional compensation from the board of supervisors. If this clause two remains in the proposal as it is at present, I think you will agree with me that before the circuit judges were elected in Kent county or any other county that the board of supervisors might provide additional compensation for that circuit judge; and then all during his term he would be entitled to receive that compensation instead of feeling that he was subject to the whims of the board of supervisors in the matter of decreasing it, or subject to the whims of the board to have it increased. I see no conflict in that provision with the principle that the board of supervisors before the election of that circuit judge may fix extra compensation for him, and after his election that the board may neither decrease it nor increase it. I think that it is a good principle to have in the Constitution, and that neither this amendment nor the amendment to it should prevail.

"MR. BURTON: Mr. President, it seems to me that before the judge is elected or when he is elected that the salary should be fixed, that is the additional salary that he shall receive from the board of supervisors; that he should be content with that salary during the term of his office; he knows what it is, and he knows if this provision stands that he can do no work that will increase his salary; nor can the board of supervisors decrease it. It is very probable that the old provision regarding the election of judges will be entirely remodeled, so if there is any real reason for making an exception in the case of judges it might be done in that provision and not in this.

"There was undoubtedly an effort on the part of the Constitution-makers of 1850 to have this provision incorporated in the Constitution. It is in there in just as

plain words as the English language can make it; 'It shall not be lawful hereafter for the legislature to increase or diminish the compensation of any officer during his term of office for which he is elected or appointed,' and it took mighty strong effort on the part of the judges of the supreme court to say that that was a temporary and not a permanent article in this Constitution.

[Note: The Supreme Court had considered this question in the following cases:

The People ex rel. Douvielle v. Manistee Supervisors (1879), 40 Mich. 585;

Hudson v. Attorney General (1907), 150 Mich. 67]

"We in Wayne county have felt the effects of the lack of this provision in the Constitution, in having our officials elected and then after they were elected, after they knew what their salaries were, going to the legislature and getting their salaries increased. There never has been an attempt, so far as I know, to have the salary decreased. I think the provision ought to stand just as it is, just as we have it.

"MR. POST: Mr. President, I agree with the principle as stated by the gentleman from Kent (Mr. Heald) but I have in mind this idea, that perhaps under the recent amendments to the Constitution some of the circuit judges in the circuit, for instance, in which Isabella county is located, have not yet taken advantage of the provisions; and the boards of supervisors of that circuit might desire to fix that salary before another election. In other words the judge of that circuit is now on his term of office, and supposing the board of super-

visors at the January session of the board should desire to raise his salary a thousand dollars—they do desire to do it, and in fact are contemplating doing it—but this is only an illustration—they would be barred from doing it under the proposal as it stands at present. That is the only objection I have to it. I think, however, that the argument advanced by the gentleman from Kent (Mr. Heald) is correct; that the proposal is all right as it stands unless it may interfere with some of those circuits to which the right to increase the compensation by the board of supervisors is given under the present Constitution.

"MR. HEALD: Mr. President, if this Constitution is adopted it will not go into effect until a year from the present January, and the board of supervisors would have until a year from now, when the Constitution would go into effect, to raise the salary if it wished to.

"MR. WATSON: Mr. President, I hope that the amendment to the amendment will prevail.

"I call attention to the fact that in the Upper Peninsula the judicial circuits are composed of several counties. Now, the greater part of the compensation paid to our circuit judges comes in the nature of extra compensation voted by the boards of supervisors, and if this proposal were to be passed as it stands now, a circuit judge after election would be barred from receiving such extra compensation. In order to get the boards of supervisors of the several counties comprising a judicial circuit to act in unison in providing extra compensation before election of a circuit judge it would be necessary for someone to have it in mind in order to have it done. Now, there is no officer of the judicial circuit that would have any interest in the matter unless it be some volunteer, except the circuit judge himself;

and it would put him in rather an unenviable position to go around the circuit seeking to have his compensation fixed. No circuit judge would do it. Furthermore it has been the practice of the boards of supervisors to fix the salaries of officers once every two years, and when these salaries are fixed the compensation of the circuit judge is also fixed. Unless there is a special provision made in this Constitution I do not think the boards of supervisors would feel justified in binding their successors for six years. It therefore would be necessary to except circuit judges in order to give our circuit judges in the Upper Peninsula and other circuit judges permission under the Constitution to enjoy that extra compensation. I do not think any harm will come from excepting circuit judges from this provision. I sincerely hope that the amendment to the amendment will prevail.

"MR. FYFE: Mr. President, I rise only because of the fear I have that this clause will affect the circuit judges of the state adversely. The term is a long one, —six years—the salary is twenty-five hundred dollars. It is scarcely possible for the judges to take care of their families on that salary and the board of supervisors of a large number of counties have added to the amount. The Judiciary Committee has carried out that idea, and in one of the reports made by that committee it provides that extra compensation may be given to those judges just as the old Constitution provided in the several instances mentioned therein. It is true that when a judge is elected he knows what he is going to get, that he is to draw twenty-five hundred dollars. The term is long, however. Many changes may occur in the business of the circuit during that time. No matter what changes do occur, the salary can neither be increased nor diminished during that period. That circuit judge,

as my brother Watson has suggested, would not take upon himself the duty—and it would be a duty really—of interviewing the boards of supervisors and having his salary increased for the next six years. A new judge could not possibly do that. The result would be that the salaries of those judges that are now fixed at twenty-five hundred dollars would remain at that figure for an indefinite number of years. It would simply compel those judges to accept that salary and to continue to take it without any increase upon the part of the board of supervisors, no matter what increase of expense or of business might arise during the term. I think one or the other of the two amendments ought to be carried.

"MR. HALL: Mr. President, I trust this proposal will pass as it has been reported out.

"Judges, when they accept their office, know what they have to depend upon. I think the idea of the supervisors or anyone else adding to the salary is wrong. Should some one volunteer in behalf of the judge to have the supervisors act in the matter, the judge necessarily feels kindly towards such person, and such a person perhaps living in the circuit might have an undue advantage over others. Let the salary be fixed, and let the judge accept it as it is or allow some one else to take the office.

"MR. FLANNIGAN: Mr. President, we have listened to the objections to a constitutional clause that shall prevent a board of supervisors from either increasing or diminishing the amount of extra compensation of a circuit judge during the term of his office. I am in entire sympathy with the effort to prevent boards of supervisors from disturbing a circuit judge's salary so far as decreasing it is concerned. It is more important that this provision of the Constitution be framed

so as to prevent the boards of supervisors from decreasing the salary of the circuit judge as it is to permit an increase of such salary during the term of the office of the judge. That thought has not entered into the provision at all. We do not know how the Judiciary Committee has treated the subject of extra compensation for circuit judges. It would strike me that before we dispose of the proposal now under consideration we ought to see the report of the committee on that subject; and if it is in order I move that this proposal be passed for the day, and in the meantime I suppose we will be able to see the report which is in the hands of the secretary.

"THE PRESIDENT: The motion is in order if the gentleman desires to make it.

"MR. FLANNIGAN: I do make it, Mr. President.

"The question being taken on the motion of Mr. Flannigan, the motion was agreed to."

[Constitutional Debates, Vol. 1, pp. 448, 449, 450, 451]

When the matter came up for consideration on the next day, January 1, 1908, the following transpired:

"THE PRESIDENT: This proposal was read for the second time yesterday, and a motion was made by Mr. Knowles to strike out clause two. Mr. Snow moved to amend by inserting the words 'except circuit judges' after the word 'officers' in line seven. When the matter was passed the question was on the amendment offered by Mr. Snow, the amendment taking precedence of the motion to strike out. The question is on the amendment.

"MR. FLANNIGAN: Mr. President, I desire to offer the following amendment:

"(Read by the secretary): Substitute for clause two, File 133, 'Salaries of public officers except circuit judges shall not be increased, nor shall the salary of any public officer be decreased, after their election or appointment.'

"The question being on the amendment,

"MR. FLANNIGAN said: Mr. President, this substitute has been submitted to both Mr. Knowles and Mr. Snow, and is satisfactory to those gentlemen. It is designed, in the substitute, to prevent the supervisors from decreasing the salaries of circuit judges during their term of office.

"THE PRESIDENT: Does the gentleman from Saginaw (Mr. Snow) withdraw his amendment?

"MR. SNOW: Yes, Mr. President, I withdraw my amendment.

"THE PRESIDENT: The gentleman from Charlevoix (Mr. Knowles) does he also withdraw his motion?

"MR. KNOWLES: Yes.

"THE PRESIDENT: The question then is on the substitute offered by the gentleman from Dickinson, Mr. Flannigan.

"MR. BURTON: Mr. President, I cannot understand the necessity for excepting circuit judges from this provision. Are circuit judges any better than anybody

else? Is there any reason why a circuit judge should not have his salary fixed the same as any other employe? It has been said here that the circuit judge holds his office for six years, and that is a long period. Why, we hire men all the time for longer periods than six years, and we fix the salaries they are to receive, beforehand—in advance. The matter of their salary is talked over with them, and they agree to it: Is there any reason why circuit judges should not do this as well as any other individual? Before the election takes place practically, which is in November, the boards of supervisors meet, and they fix the salary or the portion of the salary that each county is to pay in excess of the salary paid by the state to circuit judges, for the succeeding year. When a circuit judge comes up for election the salary has been fixed, and he knows what it will be for the succeeding six years, and he knows that that salary will not be increased during that period, and he knows that it will not and cannot be decreased during that period. A circuit judge is no better than any other employe. If his salary is to fluctuate, to be more this year and less the next, during the entire time that he is in office, he may go to the board of supervisors each year and 'log-roll,' and get the board to increase the salary, and there will be people around him and around the board of supervisors asking the board to increase his salary, and there will thus be an inducement held out to the judge to decide cases in favor of the party who helps him as against the man who does not help him. It is only right that this salary should be fixed in advance, and he should know what it is, and also know that it will not be diminished during his term of office.

"MR. FLANNIGAN: Mr. President, satisfactory reasons why the boards of supervisors should be permitted to increase the salary of a circuit judge during

his term of office were given to the Convention yesterday. I got into the discussion of this matter on the question of the authority of the board of supervisors to decrease the salary of a circuit judge during his term of office. I am satisfied they should not have that authority. I have in mind, Mr. President, one instance which occurred within my own knowledge in the state of Michigan. A minister of the gospel who was inclined to enforce the observance of the liquor law walked on the public street of a certain city in this state and looked through the windows of a saloon for the purpose of observing whether or not that saloon was illegally open. The proprietor, a great big burly saloon-keeper, saw the minister looking into the window; he walked out of his saloon and assaulted that minister on the street, abusing him most shamefully. He was arrested for assault with intent to do great bodily harm less than the crime of murder. Unfortunately, (or perhaps it would have made no difference with the result) at any rate the circuit judge could not find evidence enough in the case to warrant his submitting the question to the jury whether or not this man was guilty of assault with intent to do great bodily harm; but that he assaulted the minister and threw him down on the street there was no question; nobody denied that in the case. The jury was finally sent out for the purpose of determining whether or not this saloon-keeper was guilty of assault and battery. The jury was out a long time and was unable to agree. The circuit judge called the jury in, and in very plain language intimated that there could be no question but what this man was guilty of assault and battery. The jury was sent back to their jury room, and after a time returned into court with a verdict of not guilty. Upon that result being announced in the court room the judge said some sharp words to the jury, and not only discharged it from the consideration of that

particular case but discharged it for the remainder of the term. Upon that panel there happened to be two or three supervisors, and I believe one or two men who had influence with the board of supervisors. So at the next meeting of the board of supervisors of that county the extra compensation voted by the county to the circuit judge was cut off.

"Now, gentlemen of the Convention, do we wish to leave the constitutional provision in shape to admit of another such attack on any circuit judge?

"THE PRESIDENT: The question is on the substitute offered by the gentleman from Dickinson (Mr. Flannigan).

"The question was taken on the substitute and upon a division, yeas 47, nays 29, the substitute was agreed to.

"THE PRESIDENT: The question is on the passage of the proposal as amended.

"The question being taken on the passage of the proposal as amended, there were yeas 72, nays 13 as follows:

" • • • • "

[Constitutional Debates, Vol. 1, pp. 468, 469]

APPENDIX E

The first increase after the adoption of the 1908 Constitution was in the year 1921 when the salary was raised to $10,000 per annum. Although the 1921 act contained no provision that justices of the Supreme Court should not receive the increase until the expiration of their respective terms, the provisions of Section 3 of Article XVI were obeyed as appears from the following tabulation:

APPENDIX E.

Supreme Court Justices[1]	Date Elected or Appointed	Date Term Expires	Date Left Office	Annual Salary Rate Paid to Supreme Court Justices[2]						
				1922	1923	1924	1925	1926	1927	1928
Bird	April, 1919	1928	Feb., 1928	$ 7,000	$ 7,000	$ 7,000	$ 7,000	$ 7,000	$ 7,000	$ .....
	April, 1927	1934								
Sharp (Nelson)	Oct., 1919	1928	.....	7,000	7,000	7,000	7,000	7,000	7,000	10,000
	April, 1927	1934								
(a) Potter	Feb., 1928	1934	.....	.....	.....	.....	.....	.....	.....	10,000
Steere	April, 1921	1930	Oct., 1927	7,000	7,000	7,000	7,000	7,000	7,000	.....
Moore	April, 1921	1930	Jan., 1926	7,000	7,000	7,000	7,000	7,000	.....	.....
(b) Snow	Jan., 1926	1930	Oct., 1927	.....	.....	.....	.....	10,000	10,000	.....
(c) North	Oct., 1927	1930	.....	.....	.....	.....	.....	.....	.....	10,000
(d) Flannigan	Oct., 1927	1930	Feb., 1928	.....	.....	.....	.....	.....	.....	.....
(e) Fead	Mar., 1928	1930	.....	.....	.....	.....	.....	.....	.....	10,000
Fellows	Jan., 1917	1924	.....	7,000	7,000	10,000	10,000	10,000	10,000	10,000
	April, 1923	1932								
Wiest	Jan., 1921	1924	.....	7,000	7,000	10,000	10,000	10,000	10,000	10,000
	April, 1923	1932								
Clark	Jan., 1920	1926	.....	7,000	7,000	7,000	7,000	10,000	10,000	10,000
	April, 1925	1934								
Stone	April, 1917	1926	Mar., 1922	7,000						
(f) McDonald	Mar., 1922	1926	.....	10,000	10,000	10,000	10,000	10,000	10,000	10,000
	April, 1925	1934								

[1] The information as to the members of the Supreme Court, the applicable dates of their election or appointment, and the length of their respective terms is taken from Michigan State Bar Journal, Vol. 17, No. 7, September, 1938, pages 360-366.

[2] The information as to the salary payments in the respective years is taken from the published *Reports of the Auditor General* for the period 1922-1928.

(a) Succeeded Bird in Feb., 1928.
(b) Succeeded Moore in Jan., 1926.
(c) Succeeded Snow in Oct., 1927.
(d) Succeeded Steere in Oct., 1927.
(e) Succeeded Flannigan in Feb., 1928.
(f) Succeeded Stone in March, 1922.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 299

THOMAS M. KAVANAGH and
EUGENE F. BLACK,
Appellants,

v.

SANFORD A. BROWN, Treasurer of Michigan, et al.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

BRIEF OPPOSING MOTION TO AFFIRM

THOMAS M. KAVANAGH,
The Capitol,
Lansing, Michigan;

EUGENE F. BLACK,
County-City Building,
Port Huron, Michigan,
(members of the Bar of the Supreme Court, appearing in their own behalf).

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FOREWORD

The present and overdue abandonment, by the Michigan attorney general's department, of its Eleventh Amendment attack upon the jurisdiction, and that department's present appeal to the merits by motion to affirm, require this otherwise unnecessary brief in opposition. Until today the department's primary defense has been the alleged want of jurisdiction. Now, by the motion and the provisions of

Rule 16, §1(c), the sole issue is whether the presented questions "are so unsubstantial as not to need further argument."

The decisions of this Court which, under the equality clause, lay down rules by which facts are tested for discrimination of invidious character, require no review in a Rule 16 brief which adjuredly must be short. They simply point up Mr. Justice Cardozo's penetrating realism:[1] that the facts themselves—once they are known—determine the presence or absence of actionable inequality.

For convenience of compared reading we shall treat in the same order the seeming worthy points made in the attorney general's motion.

FIRST: The Michigan Supreme Court's 1957 Communication to the Legislature (pp. 4 and 5 of motion to affirm)

In his motion the attorney general refrains artfully from advising that the fact of such communication, and of its arrant frustration by the Legislature, *was brought into this case exclusively by plaintiff-appellants and relied upon by them as judicially resolved evidence of the very discrimination he, the attorney general, would have this Court deny.* Now, since the attorney general brings the Court's communication forth and then leaves it hastily, let us examine the meat thereof. It proceeds connectedly:

---

[1] "More and more, we lawyers are awaking to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts—the facts which generate the law. Let the facts be known as they are, and the law will sprout from the seed and turn its branches toward the light." (Mr. Justice Cardozo, quoted in 'The Art of Advocacy', by Lloyd Paul Stryker, p 11,—Simon and Schuster—1954.)

> "Currently two, and in recent times three different salary scales have been in effect for different members of this Court. With eight year, staggered terms it is inevitable that that situation will obtain for a number of years following each salary change, because of the provision of Section 3 of Article 16 of the state Constitution, prohibiting such change from taking effect during term of office. The proposed amendment herewith submitted would correct that situation and serve to equalize the salaries of all members of the Court by making any increase applicable to all at the same time at the beginning of the next fiscal year.
>
> "It is manifestly inequitable and improper that the amount of compensation paid some Justices should differ from that paid others for performance of the same service. Furthermore, the rapidity of economic change since World War II and extent thereof occurring within a span of eight years are such that adequate compensation at the outset of an eight year term becomes grossly inadequate long before its expiration."[2]

The foregoing quotation is taken from untraversed paragraph 8 of plaintiff-appellants' complaint. Paragraph 8 proceeds:

> "No reply to or acknowledgment of this communication was ever given or made by the legislature, or any committee thereof, to the Michigan Supreme Court. The communication was, so far as plaintiffs have been able to learn, totally ignored by the legislature. A similar and more vigorous effort on the part of the State Bar of Michigan, to correct the iniquitous and discriminatory impact of the presently attacked state statutes, met with

---

[2] Yes, this is the Supreme Court of Michigan, testifying unanimously to the iniquity the attorney general moves to have blessed summarily.

similar legislative disinterest during the recently concluded session (1961) of Michigan's legislature. Such effort of the State Bar was that of proposing anew the adoption of a joint resolution, submitting to the people for approval an amendment of Michigan's Constitution reading relevantly as follows:

> "'Whenever the salary of one or more of the justices of the supreme court shall be increased the salaries of the other justices shall also be deemed to be increased to the extent necessary to afford equal salaries to them all.'"

Further evidence appears in the official minutes of the Board of Commissioners of the integrated Michigan Bar, recording start of that body's ultimately fruitless effort to stop such discrimination by political distinguished from judicial action. Shortly after the Dethmers-Kelly salary Act of 1960 (with its duplicate-of-1952 "no one else" section 2) was enrolled, then Associate and now Chief Justice Carr appeared before the Board to enlist its aid. The minutes read (July 8, 1960, p. 6):

> "Associate Justice Leland W. Carr was introduced by the President and he addressed the Board on a proposed amendment to Article XVI, section 3, of the Michigan Constitution, which amendment would require payment of equal salaries to all justices of the Supreme Court and would permit increases thereof after election or appointment. He explained the present inequitable situation and the futile attempts which had been made to rectify the inequality of salaries for equal work performed."[3]

---

[3] Justice Carr was one of the members of the Court who, by the act of 1960, was due for the salary discrimination of which appellants complain. He has not joined us as a party and has risked no effort or contributed litigatory expenses; yet will receive the same fruits of success should we prevail. Already, on account of the temporary order below of March 23 (for payment of equal salaries to Michigan Supreme Court Justices), he with appellants received and accepted his salary at the uniform rate of $25,500 per annum until that order was dissolved (June 28) shortly after filing of Judge Cecil's opinion.

In the face of these recorded facts (and others to which we shall come) it is suggested that the presented questions are so unsubstantial as to require no further argument. Well, when *all* the members of a personally affected and personally embarrassed State Court of last resort resolve as quoted above, and when, three years later, the integrated Bar of that State and the present Chief Justice of that Court testify to like effect, it would seem that there is present a bit of record evidence, uncontradicted save only for conclusionary averments of an unsworn attorney general, tending reasonably to prove that the peculiar application to members of our Court, of the concluding sentence of section 3, is actionable under the equality clause.

This brings to the fore a fundamental error below, an understandable error which—as we shall presently demonstrate—probably would not have been made had Judge Martin lived to write the case he and his colleagues took under advisement last October. The court was *not* confronted by Judge Cecil's self-imposed alternative of either denying injunctive relief or holding such concluding sentence unconstitutional. We proceed, noting of due fairness that Judge Cecil (replacing Judge Martin after the latter's death) came into the case when a decision was badly needed and that he did not have the benefit of oral argument.

The plaintiffs did not ask, as all briefs made forcibly clear, *that such concluding sentence be declared unconstitutional.* That would destroy the concededly valuable prohibition against during-term salary increases which is applied properly and without discrimination to the multitude of Michigan public officers who are elected or appointed for less than 6 year terms. We did ask that such sentence be declared invalid in its application to 8-year elected members of the Supreme Court of Michigan. Such we be-

lieve was our right. As said in *Dahnke-Walker Co., v. Bondurant*, 257 US 282, 289:

> "That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another (citing cases)."

The corollary is that a litigant may challenge the constitutionality of a statute only in so far as it affects him. *Fleming v. Rhodes*, 331 US 100, 104. And see *Florida Lime and Avocado Growers v. Jacobsen*, 362 US 73, 84, holding that "if the constitutional claim against the state statute is substantial, a three-judge court is required to be convened and has jurisdiction, as we do on direct appeal, over *all* grounds of attack against the statute."

When an aggrieved person applies to a 3-judge court for injunctive relief against the enforcement by a State officer of a State statute, he is not obliged to take position that the assailed statute is a total nullity. In the historically eminent case of *Yick Wo v. Hopkins*, 118 US 356, the point was made this way (pp. 373, 374):

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

SECOND: The Taylor Case (pp. 8-10 of Motion to Affirm)

The majority opinion of this case (369 Mich 146) decided nothing except that the Michigan court of claims (a statutory court) was and is without jurisdiction to make declaratory judgments. Not one member of the Court disagreed on that score. The disagreement arose when 1 member wrote, for stated reasons (pp. 157-185), to withhold decision pending vainly suggested rehearing of an earlier and probably erroneous decision against the same Judge (*Taylor v. Auditor General*, 342 Mich 265).

It is true that the 5 signers of the majority opinion wandered deep into the daisies of dictum, yet even that dictum suggests no bar—nor could it—to plaintiff-appellant's present appeal to the Fourteenth Amendment. We need but add that the 3-times-up Taylor Case has just been resolved, finally and decisively, by the not-yet-reported case of *Taylor v. State of Michigan* (September 7, 1962).[4] The one and only point decided finally (by 4 to 2 vote without hint of touching upon any constitutional question) was that Judge Taylor, a now retired judge of the superior court of Grand Rapids, another statutory court, was not entitled to payment of "the same annual salary" by force of an 85-year-old statute which provided, and still provides (CLS Mich. 1956, §727.6):

> "The judge of said superior court shall receive from the treasury of the State of Michigan the same annual salary as may be payable to circuit judges, and payable in the same manner as are circuit judges."

[4] By letter to the clerk we shall furnish this citation just as soon as it appears in the NW2d advance sheets.

THIRD: The Attorney General's Treatment of the "Except Circuit Judges" exemption (pp. 11 and 12, of motion to affirm)

The attorney general says that "Adequate reasons appear in Michigan for the exclusion of circuit judges from the no increase provision of Section 3." He does *not* say what adequate reasons appear in Michigan for exclusion of Supreme Court Justices from the no-increase provision.

Now let us review more facts. Michigan circuit judges are 6-year term-elected by command of Michigan's Constitution (art 7, §9). The legislature may not, at will, lengthen or shorten the elective terms of circuit judges and all other constitutional officers; yet it may do so in the case of Supreme Court Justices (art 7, §2). Thus, *solely by legislative will,* Supreme Court Justices are elected for longer terms than are circuit judges, yet they have no like exemption from the no-increase prohibition.

Consider next the elective terms of all other constitutional officers of Michigan. All 144 legislative officers are elected for two year terms (art 4, §§2 and 3). So are all executive officers (art 6, §1) and so are all local officers (art 8, §3). The elective term of the superintendent of public instruction is 2 years (art 11, §2); that of the Regents of the University 8 years (art 11, §3); that of the State University Trustees 6 years (art 11, §7), and that of Probate Judges 4 years (art 7, §14).

Bearing in mind that the Regents and Trustees are elected to honorary and non-salaried offices requiring attendance of occasional and expense-paid meetings only, we find that Supreme Court Justices only are invidiously affected by the no-increase prohibition. Circuit judges, the only salaried and full-time officers who are elected for con-

stitutional terms of 6 years or longer, are exempted expressly. Salaried officials elected for terms shorter than those of Supreme Court Justices and Circuit Judges need no like exemption since they are regularly eligible for legislatively provided salary adjustments.

But what about the 8-year elected Supreme Court Justices? Can there be any rational reason for denying them salary increases for 8 years as others elected for shorter terms regularly receive such increases? There is no answer save the attorney general's naked *ipse dixit*. And we repeat: No classificationary discrimination like this ("except circuit judges") can be found in any State Constitution.

FOURTH: The Point that Michigan Supreme Court Justices So Far Have "Acquiesced" (p. 13 of Motion to Affirm)

This isn't quite true. Justices Voelker, Edwards and Talbot Smith did not "acquiesce." All three, having been elected for terms expiring respectively December 31, 1967 and December 31, 1965, left the Court, one after the other. And the undersigned appellants have never considered obeisance either. Each of us (former attorneys general of Michigan) have over the years witnessed the discriminatory effect of the salary increase act of 1952 and now the like act of 1960. We are in Court to arrest, if we can, more such calculated effort to control the Court by means of crass partisanship and arrogant discrimination.

There is another reason why the issue has moved from "acquiescence" to past due judicial action. Prior to the salary increase act of 1960 the discriminatory variation was never made more than $3,500 per year. Now it is twice that. If Justices Edwards and Voelker, Democratic nominated and elected in April of 1959 for 8 year terms

ending December 31, 1967, had remained on the Court and suffered what the attorney general would have this Court license, Justices Dethmers and Kelly, Republican-nominated and elected in April of 1961 for 8 year terms ending December 31, 1969, *each* would have received during the 6 years of common service exactly $42,000 more salary than Justices Edwards and Voelker, or a total of $84,000 more out of the State treasury. But then the attorney general—surely an honorable man—says the "disparity is but temporary."

The foregoing proves, in our respectfully submitted view, that disfavored Justices must either "take it," or "be good," or get off the Court. Which brings to mind Marshall's grim expressions concerning judicial independence (quoted from *O'Donoghue v. United States*, 289 US 516, 532):

> "The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not, to the last degree important, that he should be rendered perfectly and completely independent, with nothing to influence or control him but God and his conscience? • • • I have always thought, from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people, was an ignorant, a corrupt, or a dependent judiciary."

CONCLUSION

Perhaps the substantiality of these equal protection questions may be judged best by the recorded and now stilled voice of one of the veteran and all time great judges of the Sixth Circuit; the Honorable John D. Martin of Tennessee, presiding below when this case was exhaustively argued

and discussed—without limitation as to time—on two separate occasions at Detroit, the last being September 25, 1961. Judge Martin posed these questions for former attorney general (now Justice) Adams and declared the meritorious convictions of the then assembled court this way:

> "Hon. John D. Martin: What can be more discriminatory than to give different salaries for the same function performed by the highest State Court, or to give different salaries to each of those men? What could be much more discriminatory than that?
>
> "They are the Justices charged with the final say about Michigan law, the final decision of Michigan cases that have no appeal to the Supreme Court of the United States. They have the final say on the law in Michigan to the extent the Federal Courts have to carry it out, under the Western Telegraph Company decision.
>
> "So, to have equality of work and an equality of pay, it seems to me to be absolutely required by the Fourteenth Amendment. That is why I said before there didn't seem to be any question of discrimination. It was there; there was discrimination; and what we were concerned with was jurisdiction, whether we had jurisdiction, whether we had jurisdiction of the case." (p. 12 of transcript). * * *
>
> "Hon. John D. Martin (interposing and addressing assistant to the attorney general Faville): All I said is that we apparently are against you on the proposition of there not being discrimination against these Judges, that it was in violation of the Fourteenth Amendment. But what I do say is that we were open-minded on the matter of jurisdiction. We are just giving you the benefit of that so that, in preparing your briefs, you will help us by hitting the hurdle" (p. 16 of transcript).

It was Judge Martin who, confined at the time by last illness, approved and directed immediate issuance of the temporary restraining order of March 23. By that order, starting April 30 and continuing as we have said until June 28, all eight members of the Michigan Supreme Court received uniform salaries at the rate of $25,500 per annum. Which is to say that, if the judgment below is summarily affirmed on motion, Justices Carr, Black and Kavanagh will be obligated to pay back at once not inconsiderable amounts to Michigan's treasury; to say nothing of that stark choice such an affirmed judgment will force—this coming February—upon all genuinely *independent* candidates for the office of Michigan Supreme Court Justice. That is the month when the major parties of Michigan will each nominate two candidates for election (April 1, 1963) to the Michigan Supreme Court for the two regular eight year terms ending December 31, 1971.

Plaintiff-appellants respectfully offer the foregoing totality of record facts as proof that the presented questions are of such substance as to preclude summary disposition thereof.

Respectfully submitted,

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EUGENE F. BLACK,
County-City Building,
Port Huron, Michigan,
(members of the Bar of the Supreme Court, appearing in their own behalf).

September 12, 1962.

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